The Madras Law Journal

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—*S. Murtaza Fazl Ali and P.N. Shinghal, JJ.*

Ramanathan .. *Appellant**

v.

State of Tamil Nadu .. *Respondent.*

(A) *Evidence Act* (*I of* 1872), *section* 9—*Criminal trial—Test identification parade—Value of —Absence of evidence that accused was kept 'BA PARDA'—Effect.*

Identification parades have been in common use for a very long time, for the object of placing a suspect in a line up with other persons for identification is to find out whether he is the perpetrator of the crime. This is all the more necessary where the name of the offender is not mentioned by those who claim to be eye-witnesses of the incident but they claim that although they did not know him earlier, they could recall his features in sufficient details and would be able to identify him if and when they happened to see him. The holding of a test identification in such cases is as much in the interest of the investigating agency or the prosecution as in the interest of the suspect or the accused. For while it enables the investigating officer to ascertain the correctness or otherwise of the claim of those witnesses who claim to have seen the perpetrator of the crime and their capacity to identify him and thereby fill the gap in the investigation regarding the identity of the culprit, it saves the suspect or the accused from the sudden risk of being identified in the dock by the selfsame witnesses during the course of the trial. The line up of the suspect in a test identification parade is therefore a workable way of testing the memory and veracity of witnesses in such cases and has worked well in actual practice. [*Para.* 18.]

In the present case where there was satisfactory evidence to prove that at least two of the witnesses emphatically claimed from the very beginning of the incident that they had noticed the culprit and had in fact described him and had claimed that they could identify him, the holding of a test identification parade was absolutely necessary. The fact that such a parade was held within two days of the arrest of the accused and was held by a Judicial Magistrate with all the necessary precautions and arrangements, leaves no room for doubt that the evidence of the test identification was of considerable importance. The accused knew about that evidence from the date the parade was held and if he wanted to demolish it, it was for him to do so by effective cross-examination of the witnesses and/ or by examining his own witnesses in rebuttal. As the accused has not succeeded in doing so, it is futile to contend that this important piece of evidence should be rejected merely because the prosecution did not lead evidence to prove that the accused was kept 'BA PARDA'. [*Para.* 19.]

(B) *Evidence Act* (*I of* 1872), *section* 45—*Fire Arms Expert—Criminal trial—Comparison of crime cartridge with test cartridge—Opinion based on examination under comparison microscope without the aid of photographs—Value of.*

It cannot be doubted that a comparison microscope is the most important and most widely used scientific instrument in comparing the crime cartridge with the test cartridge. It is true that there has been considerable difference of opinion amongst investigators regarding the use of photographs in a Court for the purpose of illustrating the matching of the markings and while it may be that microscope photographs, when taken with due care and in the best of conditions, may enable the evidence to be placed on the record in a visible form, it cannot be denied that a Court would not be justified in rejecting the opinion of an expert who has examined the markings under the comparison microscope simply for the reason that he has not thought it necessary to take the photographs. It is therefore not possible in the present case for the Court to reject the evidence of the Fire Arms Expert who has categorically stated that he had compared the land and groove markings on the bullets under a comparison microscope, simply because he did not think it necessary to take photographs. [*Paras.* 25, 26.]

Cases referred to:—

Dhokal Singh v. *The State*, I.L.R. (1953) 3 Raj: 762; *State of Rajasthan* v. *Ranjita*, A.I.R.

*Crl.A. No. 483 of 1976. 18th April, 1978.

1962 Raj. 78 ; *State of Gujarat* v. *Adam Fateh Mohmed Umatiya*, (1971) 3 S.C.C. 208 : (1971) S.C.C. (Crl.) 381.

The Judgment of the Court was delivered by

Shinghal, J.—This appeal by special leave is directed against the judgment of the Madras High Court dated 19th February, 1976, convicting appellant Ramanathan of offences under section 302 (on two counts), section 307 and section 460 of the Indian Penal Code, and section 27 of the Arms Act. The High Court has confirmed the sentence of death for the offences under section 302, and has upheld the sentence of imprisonment for life for the offence under section 307, of rigorous imprisonment for 10 years for the offence under section 460 and of rigorous imprisonment for 3 years for the offence under section 27 of the Arms Act.

2. Natarajan (deceased) who was a well-to do yarn merchant of Nagercoil used to live there in his own house in Kumari Colony. His wife Smt. Nagammal (P.W.1) used to live with him in that house. Their second son Varadarajan (deceased) was 21 years old and was studying in fourth year in the Medical College at Palayamkottai. As 19th September, 1974 was Vinayakchaturthi day, he took leave of absence for a day and came to his father's house in Nagercoil on 18th September, 1974. On the following day (19th September, 1974), Natarajan returned home from his shop, in his car, at about 9 P.M. His driver parked the car in the compound of his house, locked the gate of the compound wall, delivered its key to Smt. Nagammal and went away. The other servants also went away at about 6 P.M. as usual. Smt. Nagammal locked the outer gate of her house as well as the grill door of the front verandah. Natarajan, his wife Smt. Nagammal and their son Varadarajan took their food at about 10 P.M. Varadarajan went to the office room, which was adjacent to the bedroom of his parents. for study. Smt. Nagammal retired to her bedroom and went to sleep. She woke up and went to the bath room at about 1.30 A.M. She saw that Varadarajan was sleeping on the cot which was there for the purpose in the office room. On leaf of the door of that room was open that time. Smt. Nagammal went back to her bedroom and slept there leaving one of the doors of her bedroom open. A zero watt bulb was burning in her bedroom.

3. It is alleged that at about 2.30 A.M. she heard a loud cry from the direction of her son's room and thought that he was shouting in his dream. But she heard the sound of a shot immediately thereafter. She woke up her husband Natarajan and asked him to go and look in Varadarajan's room. Natarajan opened the door leading to the drawing hall which was adjacent to his bedroom. Smt. Nagammal heard the sound of another gun shot. She went towards the drawing hall and saw appellant Ramanathan standing at a distance of about 1½ feet from the door of the drawing hall and firing his pistol at her husband who was standing near the eastern window of that room. Smt. Nagammal raised an alarm shouting "ayyo". Her husband moved to catch the appellant who went near the western portion of the drawing hall and fired at Smt. Nagammal. The shot grazed her body just above her stomach. Natarajan caught hold of the hands of the appellant and there was a tussle between them. The appellant shot at Natarajan repeatedly. Natarajan fell down but rose up. He dashed against the wall of the drawing hall. Smt. Nagammal went to his rescue, and the appellant shot at her stomach. She turned to go to the other room to use the telephone. but the appellant hit her with the pistol on her head. The appellant then pressed the head of her husband with his pistol and went towards the front verandah. Smt. Nagammal again shouted "ayyo" and ran after him. She put on the verandah lights and the front light of her house and shouted "ayyo" and cried that the thief was running away afer shooting. She found that one of the grill doors of the verandah was open at that time. The appellant ran through it picked up a bag from near Natarajan's car, scaled over the front compound wall and ran away on the road. Rajagopal (P.W.2) who was living in the opposite house heard the reports of the shots and Smt. Nagammal's shouts and came running so quickly that, according to him, he was able to see the appellant when he was getting down from the front verandah of the house and was scaling the compound wall. Smt. Laxmi who lived near Rajagopal's house, also reached there. They seated Natarajan on a sofa in the drawing hall. Muthu (P.W. 3) who lived only three houses away and was a relation of Natarajan, also heard the shots and Smt. Nagammal's shout for help and reached there. He immediately brought Dr. Samson

(P.W. 13) at about 3-15 A.M. He examined Varadarajan on his cot in the room and found that he had died. He went to the drawing hall and found Natarajan sitting on a sofa with gun-shot injuries on his chest and some injuries on his head. He was however not able to talk and was sitting with a "stunned appearance" and was bleeding. Dr. Samson found that Smt. Nagammal had also received gun-shot injuries. As it was a medico-legal case, the matter was referred to the Police and Muthu (P.W. 3) took Natarajan and Smt. Nagammal in his car to the hospital of Dr. Balasundaram (P.W. 14). First aid was given to Smt. Nagammal, while Natarajan was taken to the operation room. Inspector Narayana Nair (P.W. 30) reached there and recorded the statement (Ex. P-1) of Smt. Nagammal at about 4-30 A.M. and registered the case.

4. Smt. Nagammal narrated the incident in her aforesaid statement (Ex. P-1) and specifically stated that the culprit was aged 30 or 35 years, he appeared to be stout, and seemed to have a beard. She categorically recorded that although his name was not known to her, she could identify him "if seen".

5. Dr. Balasundaram (P.W. 14) X-rayed the injuries of Natarajan and performed an operation. He gave blood transfusion and intravenous fluids, but Natarajan succumbed to his injuries on 24th September, 1974. Dr. Balasundaram had examined the injuries of Smt. Nagammal (P.W. 1) on 20th September, 1974 at about 4-30 A.M. and found that two of her injuries had been caused by a bullet, another injury by the grazing of a bullet, and yet another injury by a hit with the butt-head of a revolver. She was taken to the Government Hospital on 24th September, 1974, but was brought back to Dr. Balasundaram's nursing home and was discharged on 25th September, 1974.

6. Investigation of the case was taken up by Inspector Narayana Nair (P.W. 30). He found blood-stains at several places on the cement floor of the front verandah and the rooms of Natarajan's house. He found three spent bullets in the drawing hall and one in the bedroom. He also recovered the lock which was lying near the sofa of the drawing hall as well as a screw-driver. He found some bullet marks also, and prepared the inquest reports. He searched the house of the appellant at Nagercoil on 20th September, 1974 at 10 P.M. after sending prior information to the Magistrate, but did not find him there. He sent special search parties to search for him. Deputy Inspector of Police Balasubramaniam (P.W. 26) searched for the appellant at several places in Madras from 28th September, 1974 to 5th October, 1974, but did not find him. He traced him to several places in Delhi from 7th October, 1974 to 19th October, 1974, but to no avail. He learnt that the appellant was at Madras and left Nagercoil for Madras where he learnt that the appellant was in Hyderabad. He reached Hyderabad on 11th November, 1974 and learnt that the appellant was in-patient in Sarojini Eye Hospital, Hyderabad. He went there and arranged for his discharge from that hospital. He was ultimately arrested on 14th November, 1974 by Inspector Sadasivan Nair (P.W. 31) An identification parade was held soon after, on 16th November, 1974, by Kanagasabapathy (P.W. 27) Judicial Magistrate. He was correctly identified by Smt. Nagammal (P.W. 1), Rajagopal (P.W. 2) Samraj (P.W. 9) and Vasantha (P.W. 10). The Investigating Officer took the help of the ballistic expert also. Ultimately the appellant was charge-sheeted and was tried and convicted as aforesaid.

7. It has been argued by Mr. Anthony, learned Counsel for the appellant, that Smt. Nagammal (P.W. 1) knew the appellant before the incident as he used to reside in Nagercoil and there were civil and criminal cases between him and her husband. Our attention has particularly been invited to the copy of a notice sent by the appellant to Natarajan on 24th, (26?), December, 1969, in which he had stated that when he came to see him, he was told by his wife that he (Natarajan) had gone to Trivandrum, that he would come in the night and that he would fix the price and complete the transaction of the property which was the bone of contention between the appellant and the deceased. We find however that when such a suggestion was made to Smt. Nagammal (P.W. 1) she categorically denied having seen the appellant prior to the date of the incident. She in fact stated that while she had heard his name, she had not met him before the incident. It has been argued, and has not been disputed, that the aforesaid notice was not exhibited or proved during the course of the trial, and does not really form part of the record. The High Court has, all the same, taken the view that even if it were assumed that Smt. Nagammal (P.W. 1) saw the appellant on one occasion in December,

1969, at her house, in the casual manner referred to in the notice, it was quite likely that she did not note his features and may not have remembered them after a lapse of more than four years. Then there is the further fact that the appellant has himself stated that he did not even know that her house was situated in Kumari Colony, Nagercoil. So if that was the position regarding his contact with the house of the husband of Smt. Nagammal, the High Court cannot be blamed for arriving at the conclusion that she did not know the appellant at the time of the incident and had to describe the assailant with reference to his physiognomy.

8. An ancillary argument has been made that as Natarajan (deceased) undoubtedly knew the appellant, the fact that he did not name him to his wife Smt.Nagammal (P.W. 1), his neighbour Rajagopal (P.W. 2), his relation Muthuswami (P.W. 3), Dr. Samson (P.W. 13) or to Dr. Balasundaram (P.W. 14) even though he died after four days of the incident, is sufficient to rule out the possibility that it was the appellant who had committed the murders. It has also been argued that if Natarajan could shout "ayyo" at least once as stated by his wife, he could as well shout his name at the time when he saw him for the first time, during the course of the incident. We have gone through the statements of all these witnesses and we find that all of them were questioned in this respect and have given categorical answers. Smt. Nagammal (P.W 1) has stated that her husband was not able to talk "on account of the shock". Rajagopal (P.W. 2) has stated that when he reached the house of the deceased, he found that there was blood on the injuries which had been caused to him by gun-shots, "he was stupefied" and "did not talk about anything". When he was cross-examined further, he stated that when he saw Natarajan for the first time " he was in a stupor" and that he did not say anything about the person who had attacked him. As the witness reached the place immediately on hearing the gun shots, so much so that, according to him, he was able to see the appellant when he was getting down from the front verandah of the house and was scaling the compound wall, his statement is important and fully corroborates the statement of Smt. Nagammal (P.W. 1). Muthuswami (P.W. 3) also reached the place of occurrence soon after, on hearing the shouts of his aunt Smt. Nagammal (P.W. 1). He has stated that he asked Natarajan what had happened, but he was in 'a shock' and 'never replied'. Muthuswami (P.W. 3) reached the house of Dr. Samson (P.W. 13) at about 3-15 A.M. and both of them returned to the house of the deceased in about 5 or 7 minutes. Dr. Samson (P.W. 13) has stated that he found Natarajan (deceased) sitting on a sofa-*cum*-bed, he had gun-shot injuries on his chest and some injuries on his head, and that he was 'not able to talk to me ' and was ' sitting with a stunned appearance'. The witness asked Natarajan what had happened, but he did, not reply. Then there is the statement of Dr. Balasundaram (P.W. 14) who examined all the injuries of Natarajan at about 4-15 A.M. He has categorically stated that Natarajan was not in a position to speak at that time, and that he asked questions to him but 'he could not respond'. The witness has further stated that Natarajan was unable to speak from the time of his admission in his Nursing Home, that he was not responding even to painful stimuli even though he could sit, and that the same condition continued till his death. The witness denied the suggestion that Nataraj an regained consciousness and was able to talk. He has stated that he was "dazed" and even though there was no serious injury on his head, there may be other reasons for which he was not able to talk even though his centres of speech were not affected. It would thus appear that the High Court has taken all the relevant evidence into consideration in taking the view that Natarajan was not able to name the appellant at the time of the incident or thereafter.

9. Dr. Natarajan (P.W. 15,) who was Professor of Forensic Medicine, performed the *post-mortem* examination on Natarajan's body. He has mentioned the numerous injuries on the dead body. In particular he has stated that the right lobe of the liver was pale and cirrhotic with laceration in the middle of the right lobe and contuison around. There was another laceration in the right lobe of the liver. The 4th rib was found cut and was absent. There was communited fracture of the 5th rib above the middle portion with a number of bits of the bone along with clots of blood. There were fractures of the 6th and 8th ribs also and there was a long contusion. Then there was another equally long contusion on the right parietal pleura along with ribs Nos. 1 to 6 in the middle. There was a very long contusion along ribs 1 to 8 on the left side measuring 20 cm.×6 cm. in the left parietal pleura. The witnes has

stated the serious condition of the lungs and has stated that Natarajan died of haemorrhagic shock resulting from the injuries sustained by him. The brain surface vessels had congested and the cut sections of the brain disclosed patchial haemorrhages. The injuries which were inflicted on Natarajan were therefore very serious, and we are unable to think that the High Court went wrong in reading the evidence while arriving at its finding that Natarajan was not in a position to name his assailant.

10. It has further been argued in this connection that there was no sufficient light which could enable Smt. Nagammal (P.W. 1) and Rajagopal (P.W. 2) to identify the appellant. It is true that there was no light in the drawing hall, or in the office room where Varadarajan was sleeping, or in the front grill verandah from which the appellant is alleged to have broken into the house. Smt. Nagammal (P.W. 1) and Rajagopal (P.W. 2) have however stated that two mercury street lights, each having two tubes, were burning in front of the verandah, and it is not disputed that the distance between them and the verandah was not more than 29 feet. Rajarathinam (P.W. 8) has stated that he had put on the street light switch on the preceding evening at 6-30 P.M. and that all the three street lights on Kumari Colony road were burning. Moreover, Smt. Nagammal (P.W. 1) has stated that the street light was flowing through the half open front door of the drawing hall and that a white zero watt bulb was burning in her bed-room. She has also stated that there was a ventilator just above the window of the drawing hall through which the light was coming. As has been stated, the verandah had a grill, and even if Mr. Anthony's argument is accepted that the shutters of the window of the drawing hall had been closed and the street light did not pass through them, the High Court cannot be blamed for holding that there was sufficient light to enable Smt. Nagammal to see and notice the features of the appellant.

11. An effort was made to argue that as Smt. Nagammal did not mention in her statement Ex. P-1 that her assailant was wearing a turban, the description was quite insufficient and should have been rejected. We have examined Smt. Nagammal's statement in Ex. P. 1. She has stated that the assailant was about 30 or 35 years old, he appeared to be stout (hefty?) and seemed to have a beard. The High Court has taken the view that the description was satisfactory. and we see no justification why it should be rejected merely because Smt. Nagammal did not state, at that time, that her assailant was wearing a turban. Her explanation that she could not make a mention of the turban in Ex. P.-1 because of "anguish" cannot be said to be unsatisfactory. Then there is the further fact that a mention had been made of the turban even at the time of the inquest report which was drawn up the same day. It would thus appear that when the other description in Ex. P.-1 was quite satisfactory. It could not have been rejected merely because Smt. Nagammal did not state that the assailant was wearing a turban.

12. The prosecution has examined Smt. Nagammal (P.W. 1) and Rajagopal (P.W. 2) as the main witnesses against the appellant. We have made a mention of the description of the assailant given by Smt. Nagammal in her report Ex. P.-1 and its reiteration in her statement in the trial Court with the further statement that the assailant was wearing a turban at the time of the incident. In both the statements she claimed that she would be able to identify him on seeing him. As has been stated, there is no reason to disbelieve her statement that she had not seen him on any earlier occasion. The incident involved two murders, and the firing of at least eight shots including the two which hit Smt. Nagammal from close proximity. All that must have given sufficient opportunity to Smt. Nagammal to notice the features of her assailant who was out to destroy her family. There was sufficient light to enable her to do so and it therefore remained for the Investigating Officer to arrange for a test identification parade. We shall deal with that aspect of the evidence in a while.

13. Rajagopal (P.W. 2) was the Vice-Chairman of the Nagercoil Municipality and was living just across the road, at a distance of not more than 40 feet from the house of the deceased. He has stated that he immediately got up on hearing the two gun shots and put on the light of his house. He went and saw both in front and backward but could not see anything at his house. He again went to bed. Two minutes later he heard 4 or 5 shots from Natarajan's house. He immediately put on the light of the drawing hall of his house and came to his front verandah. He heard Smt. Nagammal (P.W. 1) raising an alarm, and saw the appellant getting down from the front verandah of her house, going

north, towards her carshed and then scaling the front compound wall of her house and jumping and running away towards the north of the main road. The witness did not know the appellant earlier, but he saw that he was having a beard and had tied a circular turban. He clearly stated that he could see him because of the tube lights which were burning at that time and the light in front of Natarajan's verandah. The Investigating Officer therefore wanted to test his capacity for identification also, as soon as the culprit was arrested.

14. It will be recalled that the appellant could be arrested only on 14th November, 1974, and it is not disputed that a test identification parade was held soon after on 16th November, 1974. It cannot therefore be said that there was any delay in holding the parade. The parade was held by Kanagasabapathy (P.W. 27), who was a Judicial Magistrate at Nagercoil. He has stated that he selected eleven under-trial prisoners from the sub-jail for the test identification parade who were almost of the same size and complexion as the appellant, and that as the appellant was having a slight beard, three of the selected under-trial prisoners were persons having slight beards "just like the accused." It appears from the memorandum of the identification parade that the persons who were mixed with the appellant were persons of the same status (or position in life). The appellant was allowed to change his place (or number) on each occasion when a witness was called to identify him. The Magistrate has given all the details of the identification parade and has stated that the appellant was correctly identified by Smt. Nagammal and Rajagopal, as well as by the two other witnesses. No effective argument has been made why the evidence of the test identification parade should not have been believed by the trial Court and the High Court in these circumstances.

15. An attempt was made to argue that the witnesses were able to identify the appellant because his photograph had appeared in a local newspaper on 16th November,1974. Smt. Nagammal (P.W. 1) has however stated that she was not in the habit of reading a newspaper and did not even know about the publication of any such issue. Rajagopal (P.W. 2) was also cross-examined in this respect and he has also stated that he had not noticed any such publication. It cannot therefore be said that the parade was a farce or was a got up affair.

16. It has however been argued further that as only the appellant was wearing a white *dhoti* and a white shirt, the test identification parade was of no consequence and the High Court erred in taking a contrary view. It may be pointed out that when such a suggestion was made to the Magistrate who held the test identification parade, he denied it, and it cannot be said that there was any such infirmity in the parade. There is also satisfactory evidence to prove that the appellant was not wearing spectacles as his pair was given to another prisoner before the witnesses were called in for his identification.

17. Mr. Anthony has however argued that as the prosecution had not led any evidence to prove that the appellant was kept '*ba parda*', the test identification parade was of no consequence because of that fatal infirmity. Learned Counsel has tried to find support for his argument from a decision of the Rajasthan High Court in *Dhokal Singh and another* v. *The State*[1], where it was held that it was the duty of the police not only to warn the accused at the time of his arrest to keep his head hidden as he was to be put up for identification but to keep him *ba parda* and to make proper entries in the police record to that effect. It was also held in that case that the evidence of the police constable or the other police officers should be produced to prove that the accused had been kept *ba parda*. It appears, however, that the learned Counsel was not aware of a later decision of a Full Bench of the Rajasthan High Court in *State of Rajasthan* v. *Ranjita*[2], in which *Dhokal Singh's case*[1], was referred for the purpose, of laying down the correct law on the following matters.

> "(1) Whether it is necessary that entries should be made in the various Police records of the precautions that were to be taken for keeping the accused person *ba parda* while under Police custody;
>
> (2) Whether it should be specified in the warrant of commitment of the accused, when he is sent to the judicial custody that he is to be kept *ba parda* till the identification parade takes place and what precautions should the jail authorities take for keeping the accused *ba parda*;

1. I.L.R. (1953) 3 Raj. 762.
2. A.I.R. 1962 Raj. 78.

(3) Whether necessarily entries should be madet in the jail records for keeping the accused *Ba Parda* while he is in the judicial lock up."

The Full Bench examined the matter and held that the propositions laid down in *Dhokal Singh's case*[1] could not be regarded as a rule of law and had been far too broadly laid down to merit acceptance even as practical propositions and could only lead to the accentuation of the difficulties of honest investigating officers and truthful witnesses. The Full Bench answered the questions as follows:

"(1) It is not necessary that entry should be made in the various police records of the precautions that were taken for keeping the accused persons *Ba Parda* while under police custody.

(2) It is also not necessary to specify in the warrant of commitment of the accused when he is sent to judicial custody that he is to be kept *Ba Parda* till the identification parade takes place, nor is it necessary to specify the precautions that the jail authorities are to take for keeping the accused *Ba Parda*.

(3) It is also not necessary that entries should be made in the jail records for keeping the accused *Ba Parda* while he is in the judicial lock up."

The appellant cannot therefore derive any benefit from the decision in *Dhokal Singh's case*[1], which has been adequately re-examined in *Ranjita's case*[2].

18. Identification parades have been in common use for a very long time, for the object of placing a suspect in a line up with other persons for identification is to find out whether he is the perpetrator of the crime. This is all the more necessary where the name of the offender is not mentioned by those who claim to be eye-witnesses of the incidents but they claim that although they did not know him earlier, they could recall his features in sufficient detail and would be able to identify him if and when they happened to see him. The holding of a test identification in such cases is as much in the interest of the investigating agency or the prosecution as in the interest of the suspect or the accused. For while it enables the investigating officer to ascertain the correctness or otherwise of the claim of those witnesses who claim to have seen the perpetrator of the crime and their capacity to identify him and thereby fill the gap in the investigation regarding the identity of the culprit, it saves the suspect or the accused from the sudden risk of being identified in the dock by the selfsame witnesses during the course of the trial. The line up of the suspect in a test identification parade is therefore a workable way of testing the memory and veracity of witnesses in such cases and has worked well in actual practice.

19. In the present case where there was satisfactory evidence to prove that at least two of the witnesses emphatically claimed from the very beginning of the incident that they had noticed the culprit and had in fact described him and had claimed that they could identify him, the holding of a test identification parade was absolutely necessary. The fact that such a parade was held within two days of the arrest of the appellant, and was held by a Judicial Magistrate with all the necessary precautions and arrangements, leaves no room for doubt that the evidence of the test identification was of considerable importance. The appellant knew about that evidence from the date the parade was held and if he wanted to demolish it, it was for him to do so by effective cross-examination of the witnesses and/or by examining his own witnesses in rebuttal. As the appellant has not succeeded in doing so, it is futile to contend that we should reject this important piece of evidence merely because the prosecution did not lead evidence of the nature referred to in *Dhokal Singh's case*[1]. The trial Court and the High Court have placed reliance on the statements of Smt. Nagammal and Rajagopal and have found that the identification parade was held 'properly and fairly'. No satisfactory argument has been advanced why we should interfere with that finding.

20. It has next been argued that although the evidence of the prosecution showed that eight shots were fired at the time of the incident, the High Court erred in accepting the opinion of Ramiah (P.W. 23), who was the

1. I. L. R. (1953) 3 Raj. 762.
2. A. I. R. 1962 Raj. 78.

1. I. L. R. (1953) 3 Raj. 762.

Fire Arms Expert of the Tamil Nadu Forensic Science and Chemical Laboratory, Madras, that all of them were fired from one and the same fire-arm. It has been urged that as no "empties" were found at the place of the incident, the eight shots could not have been fired from a pistol and the expert's opinion that they could have been fired from a revolver should not have been accepted as, even according to him such revolvers with eight chambers were rare. It has also been argued that the evidence of the expert could not have been accepted because he did not take photographs for the purpose of comparing the land and groove markings on the bullets and contented himself by their comparison under a "comparison microscope".

21. We do not think there is any real basis for this argument. Even if it were assumed for the sake of argument that the crime revolver had only six chambers and an eight-chamber revolver was not available for the commission of the murders, there was nothing to prevent the appellant from reloading the revolver after firing the first two shots on hearing which Smt. Nagammal (P.W.1) came from the threshold of her bedroom to the drawing hall. Ramiah (P.W.23) has stated that if the person using the revolver had been an expert, he would have required about a minute to reload it. The prosecution has led satisfactory evidence to prove that the appellant was an expert who had taken regular training in the use of firearms and had passed it with credit. If it would take a minute for an expert to reload all the six chambers, it would have taken less than that time in replacing the two cartridges which were used in the first two shots. As it is, the evidence on the record does not exclude the possibility of such a reloading, and when an assassin who has received training in the use of firearm trespasses at night into the house of his enemies with the intention of murdering them, it would be quite natural for him to replace the discharged cartridges. Much would not therefore turn on the question whether the appellant used a six or an eight chamber revolver in the commission of the crime.

22. In support of his argument regarding examination under the comparison microscope without the aid of photographs, Mr. Anthony has placed reliance on *The State of Gujarat* v. *Adam Fateh Mohmed Umatiya and others*[1]. In that case the expert did not take photographs of the misfired cartridges and admitted that the photographs were necessary for comparison. In that context this Court made a reference to Burrad's "The Identification of Firearms and Forensic Ballistics," 3rd edition, 1956, page 175, where it has been stated that any evidence of identification which is unsupported by photographs cannot be regarded as being anything more than an expression of opinion, and held that it did not establish that the test cartridges and the empty cartridges were fired from the same weapon or that the misfired cartridge was fired from the same weapon. That was therefore a different case which was decided on its own facts. It also appears that there was no evidence in that case to show that the comparison had been made with the help of comparison microscope. The evidence of the expert therefore suffered from an inherent infirmity and was not satisfactory.

23. Counsel for the appellant however tried to refer to some observations from Hatcher's "Firearms, Investigation, Identification and Evidence" for the purpose of showing the importance of photography and the use of enlarged photographs in such cases. Hatcher has devoted a whole chapter to photography in investigation of firearms crime and while discussing the history of firearms identification he has pointed out the reasons why considerable importance was given to such photographs for the visual satisfaction of the Judge and the jury. But while referring to the importance of photographs taken directly through comparison microscope, he has devoted a paragraph to the decline in the use of micro-comparison photographs and has gone on to state as follows:—

> "There are also photographic reasons for the almost entire abandonment of this method of presentation. Unfortunately, the lenses of a camera do not adjust in the way that the human eye adjusts. The depth of field is extremely limited. Unlike the human eye, a photographic film has far less tolerance to variations in lighting. Photographs are almost always unsatisfactory to the expert who has made a positive comparison through the micro-

1. (1971) 3 S.C.C. 208: (1971) S.C.C. (Crl.) 381.

scope. You photograph only what you can see at one single time. The camera cannot move along the surface of bullets to pick up identity after identity."

24. The position has been stated as follows in section 178 (page 260) of Ehrlich and Jones' "Photographic Evidence", 1967 edition :—

"Usually more can been seen through a microscope than can be photographed through it. There are several reasons for this superiority of visual perception. In the first place, the eye looking through a microscope can scan the field and change focus at different points of the field. In addition, the eye can see any movement present, and, with the aid of mental "filling in" is able to perceive form and detail that may not be recorded photographically. Moreover, the lens system of microscope produces a curved field; this works out nicely for the eye since the retina is curved, but does not work so well photographically since the film plane is flat. Due to this latter defect, not all of the field will be photographed to the same degree of sharp focus, and some distortion may be produced in the photograph."

25. It cannot therefore be doubted that a comparison microscope is the most important and most widely used scientific instrument in comparing the crime cartridge with the test cartridge. Such microscopes are of various types but they have been described as follows in Volume I of Mathews' "Firearms Identification" at page 38 :—

"A comparison microscope consists essentially of two compound microscopes, having identical optical systems so that they give the same magnification, connected by an optical 'bridge' containing a combination of prisms such that by viewing two separate objects (one under each microscope) through a single eye piece the two objects may be compared by bringing the images of parts of each into juxtaposition."

It has further been stated that when the desired condition is attained for purposes of comparison the bullets are said to be "matched" and correct opinion can be given thereon.

26. It is true that there has been considerable difference of opinion amongst investigators regarding the use of photographs in a Court for the purpose of illustrating the matching of the markings and while it may be that microscope photographs when taken with due care and in the best of conditions, may enable the evidence to be placed on the record in a visible form, it cannot be denied that a Court would not be justified in rejecting the opinion of an expert who has examined the markings under the comparison microscope simply for the reason that he has not thought it necessary to take the photographs. It is therefore not possible for us to reject the evidence of Ramiah (P.W.23) who has categorically stated that he had compared the land and groove markings on the bullets under a comparison microscope, simply because he did not think it necessary to take the photographs.

27. It has next been argued by Mr. Anthony that the appellant could not possibly have committed the murders as he had written a letter to the Magistrate informing him that he was involved in two motor-cycle accidents in 1948 and 1963, three car accidents in 1966, 1970 and 1974, and had been injured in 1969 when a constable stamped on his leg, and had lost his vision in the accident etc. Reference in this connection has also been made to the statement of the Investigating Officer showing that the accused was brought to the Court of Session by supporting him with an arm, and to the fact that he was found by the police in the Sarojini Eye Hospital after the present incident. We find that a similar argument was urged for the consideration of the trial Court as well as the High Court, but it was rejected for satisfactory reasons. Sreenivasan (P.W.16) who was the Inspector incharge of the Civilian Rifle Training Centre at Nagercoil, has stated that the appellant was one of the members of the Centre who received training under him from 2nd January, 1972 to 12th March, 1972 and passed the test having secured a high percentage of marks. The witness has stated that the appellant was in a fit state of health, that his vision was all right, and that he could shoot the rifle by triggering it only with his left-hand. He has further stated that the appellant used to take aim with his left eye and press the trigger with his left forefinger and that a person who knows how to fire a rifle can also fire a revolver. There is therefore no occasion for us to re-examine the finding of the two Courts regarding the ability of the appellant to commit the crimes.

28. An attempt has also been made to argue that there was no justification for the High

Court to take into consideration the evidence regarding the movement of the appellant after the occurrence and that he did not in fact abscond and his statement that he had gone to Madras to see off Subramania Thevar's son on 20th September, 1974 as he was leaving for America, should have been accepted. This argument is also of no consequence in view of the detailed statement of Deputy Inspector Balasubramaniam (P.W. 26) who was placed on special duty in the months of September, October and November, 1974, to trace out the appellant. The prosecution has examined some other witnesses also regarding the movements of the appellants, but even the statement of Balasubramaniam (P.W. 26) is sufficient to justify the High Court's view in the matter.

29. The prosecution has led evidence to prove the motive for the crime, and it has been argued that the High Court erred in taking the view that the dispute in regard to the resale of the coconut tope was a "burning issue" between the appellant and the deceased at the time of the incident. Even if the other evidence on the record is left out of consideration, there can be no doubt that the deceased had purchased the coconut tope from the appellant's brother and the appellant was not only challenging his possession but was pressing him for a resale. The evidence relating to the civil and criminal cases between the parties justifies the conclusion arrived at by the High Court which, we have no doubt, is essentially correct.

30. It has lastly been argued that although a number of finger prints were obtained by the Investigating Officer and others, the High Court did not take into consideration the fact that those prints did not compare with the finger prints of the appellant. It has been pointed out that the High Court erred in thinking that the finger prints of Varadarajan were not obtained by the police even though the inquest report showed that the prints had been taken. It is true that the evidence on the record goes to show that a number of finger prints were obtained during the course of the investigation, and it may be that the identity of the appellant could not be established on that basis, but that could not be said to be enough to justify his acquittal when there was overwhelming evidence against him to establish his guilt.

31. It would thus appear that the learned Counsel for the appellant has not been able to advance any such argument as would justify this Court's interference with the concurrent findings of the trial Court and the High Court against the appellant. The appeal fails and is dismissed.

V.K. ——— *Appeals dismissed.*

THE SUPREME COURT OF INDIA.
(Criminal Appellate Jurisdiction.)

PRESENT :—*P.N. Shinghal and D. A. Desai, JJ*

Muthu Naicker and others etc. .. *Appellants**

v.

State of Tamil Nadu .. *Respondent.*

(A) *Constitution of India* (1950), *Article* 136—*Criminal trial—Special leave—Reappraisal of evidence by Supreme Court—When justified.*

In appeals by special leave ordinarily the Supreme Court does not undertake to reappreciate evidence. However, where the Sessions Judge rejects the entire prosecution evidence as unworthy of belief and the High Court implicitly relies on almost the entire evidence, the Supreme Court cannot escape the duty to examine the evidence for the purpose of ascertaining whether there has been any such error of law or fact as to vitiate the findings in the impugned judgment. [*Para*.4.]

(B) *Criminal trial—Appreciation of evidence—Occurrence involving rival factions—Partisan evidence—Appreciation of—Proper approach.*

Where there is a melee and a large number of assailants and number of witnesses claim to have witnessed the occurrence from different places and at different stages of the occurrence and where the evidence is undoubtedly partisan, the distinct possibility of innocent being falsely included with guilty cannot be easily ruled out. In a faction-ridden society where an occurrence takes place involving rival factions it is but inevitable that the evidence would be of a partisan nature. In such a situation to reject the entire evidence on the sole ground that it is partisan is to shut one's eyes to the realities of the rural life in our country. Large number of accused would go unpunished if such an easy course is charted. Simultaneously, it is to be borne in mind that in a situation as it unforlds in the present case, the easy tendency to involve as many persons of the opposite faction as possible by merely naming them as having been seen in the melee

* Crl. As. Nos. 230 and 238 of 1972 and 97 of 1973.
10th August, 1978.

is a tendency which is more often discernible and is to be eschewed and therefore, the evidence has to be examined with utmost care and caution. [*Para.* 6.]

(C) *Penal Code* (*XLV of* 1860), *section* 149—*Unlawful assembly—Occurrence involving rival factions in a village—Persons present whether curious spectators or members of ulnlawful assembly—Determination of.*

Whenever in uneventful rural society something unusual occurs, more so where the local community is faction-ridden and a fight occurs amongst factions a good number of people appear on the scene not with a view to participating in the occurrence but as curious spectators. In such an event mere presence in the unlawful assembly should not be treated as leading to the conclusion that the person concerned was present in the unlawful assembly as a member of the unlawful assembly. Vicarious liability would attach to every member of the unlawful assembly if that member of the unlawful assembly either participates in the commission of the offence by overt act or knows that the offence which is committed was likely to be committed by any member of the unlawful assembly and becomes or continues to remain a member of the unlawful assembly. [*Para.* 7.]

(D) *Criminal Procedure Code* (*V of* 1898), *sections* 161 *and* 162—*Statement of witness recorded under section* 161—*Omissions or contradictions—Proof.*

In the present case one curious practice not known to law adopted by the trial Court was that whenever a witness was asked about an omission with reference to the statement of the witness recorded by the investigating officer under section 161, Criminal Procedure Code, the Public Prosecutor would make a statement whether the statement referred to in evidence was to be found or was not to be found in the statement under section 161 and no attempt was made to prove the omission. Such concession for proof of contradiction or omission lacks support of law and is likely to be unfair to the witness in that when the investigating officer is questioned with regard to the contradiction or omission, a further opportunity will be available to him to explain the contradiction or omission. [*Para.* 17.]

(E) *Criminal trial—Evidence of partisan witness—Value of.*

It cannot be suggested that the evidence of a partisan witness must be discarded on that ground alone. That puts the Court on guard to scrutinise their evidence with more than ordinary care. It must focus its attention on whether there are discrepancies in the evidence; whether the evidence strikes the Court as genuine and whether the story as narrated is probable. Judicial approach has to be cautious in dealing with such evidence. [*Para.* 18.]

(F) *Penal Code* (*XLV of* 1860), *section* 149—*Several persons emerging together and attacking deceased—Inference as to formation of unlawful assembly with common object to attack deceased—Propriety.*

If some persons had collected at one place and on seeing the deceased alighting from the bus, emerged from that place and chased him and some of them belaboured him, it can be said that they had met for a purpose and had a common object and acted in concert. Now, if some persons combined to attack the deceased and if they emerged together one can say that those who are the members of this assembly shared the common object of the assembly, *viz.*, to assault and even to cause hurt to the deceased. That at that stage an unlawful assembly was formed is unmistakably established. [*Para.* 37.]

(G) *Criminal Procedure Code* (*V of* 1898), *sections* 161 *and* 162—*Statement recorded under section* 161—*Omissions in —Proof —Mode—Confronting witness with police statement—Legality.*

In cross-examining a witness with regard to omissions made in the statement recorded under section 161, Criminal Procedure Code, the question should be framed in a manner to point out that from amongst those accused mentioned in examination-in-chief there were some whose names were not mentioned in the police statement and if the witness affirms this no further proof is necessary and if the witness denies or says that she does not remember, the investigation officer should be questioned about it. Confronting the witness with police statement is the most objectionable manner of using it and must be emphatically disapproved. [*Para.* 53.]

(H) *Penal Code* (*XLV of* 1860), *section* 149—*Unlawful assembly—Stray assault by one—Effect—Liability of others.*

Where a large crowd collected all of whom are not shown to be sharing the common object of the unlawful asssembly, a stray assault by any one accused on any particular witness

could not be said to be an assault in prosecution of the common object of the unlawful assembly so that the remaining accused could be imputed the knowledge that such an offence was likely to be committed in prosecution of the common object of the unlawful assembly.

[*Para.* 55.]

Cases referred to :

Masalti v. *State of Uttar Pradesh*, (1965) M.L.J. (Crl.) 312 : (1965) 1 S.C.J. 605 : (1964) 8 S.C.R. 133 : A.I.R. 1965 S.C. 202, *R. Kondaiah* v. *State of Andhra Pradesh*, (1975) 3 S.C.C. 752 : (1975) S.C.C. (Crl.) 213: (1975) 2 S.C.J. 499: (1976) M.L.J. (Crl.) 21 : (1976) 1 An.W.R. (S.C.) 1 : A.I.R. 1975 S.C. 216.

The Judgment of the Court was delivered by

Desai, J.—These three appeals arise out of the judgment rendered by a Division Bench of the High Court of Madras in Criminal Appeal No. 295 of 1970 convicting 27 appellants for different offences who were acquitted of all charges levelled against them by the learned Sessions Judge, Chingleput Division in Sessions Case No. 25 of 1969 in which 28 persons were put up for trial for various offences including the one under section 302 read with section 34, Indian Penal Code, against accused Nos. 1 to 10, 16, 17, 19 and 20, and under section 302 read with section 149, Indian Penal Code, against rest of the accused and 3 other charges for specific offences under sections 323, 324, 325 read with sections 149 and 427 read with section 34, Indian Penal Code. The learned Sessions Judge entertained a reasonable doubt about the veracity of the prosecution evidence and giving benefit of doubt, rejected the prosecution case in its entirety and acquitted all the accused. The State of Tamil Nadu preferred an appeal to the High Court of Madras against original accused Nos. 1 to 27. No appeal was preferred against the acquittal of original accused No. 28 and it has become final. The High Court practically accepted the entire prosecution case and convicted accused Nos. 1 to 27, *i.e.*, all the accused in respect of whom the State had preferred an appeal, and sentenced them to varying terms of imprisonment on different counts. Original accused Nos. 1 to 7 and 19 were convicted amongst others, for an offence under section 302 read with section 34 of the Indian Penal Code and each of them was sentenced to suffer imprisonment for life. These 8 accused preferred Criminal Appeal No. 230 of 1972 under section 2 (*a*) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1971. Original accused Nos. 8 to 18 and 20 to 27 applied for and obtained special leave in Criminal Appeal No. 238 of 1972. Original accused Nos. 1 to 7 and 19 were also convicted for various other offences and in respect of their convictions for offences other than the one under section 302 read with section 34, Indian Penal Code, they applied for and obtained special leave in Criminal Appeal No. 97 of 1973. Thus, these three appeals arise from the same judgment and accordingly were heard together and are being disposed of by this common judgment.

2. A curious feature of this case which has caused us not inconsiderable anxiety is that in all 28 persons were challenged before the learned Sessions Judge who framed charges against the accused under 39 different heads. The prosecution in all examined 34 witnesses including prosecution witnesses Nos. 1, 2, 4, 6, 7, 8 and 13 who are alleged to have suffered injuries at the scene of occurrence and in all probability in the course of the occurrence, and yet the learned Sessions Judge was not impressed by the evidence of any of these witnesses and rejected the entire prosecution case as unworthy of belief and acquitted all the accused. When the matter was taken to the High Court by the State against all accused, except the last, the High Court was of the opinion that the appreciation of evidence by the learned Sessions Judge has been "so unreasonable that the evidence given by the witnesses was discarded only on the ground that it is the evidence of partisan witnesses and the judgment of the trial Court is vitiated by incoherent and heterogeneous medley of confused thinking, clarity and cogency being foreign to the judgment of the trial court". With this vryptic obsercation the High Court accepted almost the entire prosecution case except where a concession was made by the learned Public Prosecutor appearing for the State and convicted all the appellants, *viz.*, original accused Nos. 1 to 27 for various offences. Accused Nos. 1 to 7 and 19 were convicted for an offence under section 302 read with section 34, Indian Penal Code, and each of them was sentenced to suffer imprisonment for life. Accused Nos. 1, 6, 7, 8, 11, 12 to 15, 19, 20, 22, 23, 26 and 27 were convicted for an offence under section 147, Indian Penal Code, and the remaining accused were convicted

for an offence under section 148, Indian Penal Code. Accused Nos. 7, 17, 21 and 29 were convicted for an offfence under section 323, Indian Penal Code. Accused Nos. 7, 11, 13, 23 and 25 were convicted for an offence under section 324, Indian Penal Code. Accused No. 19 was convicted for an offence under section 325, Indian Penal Code, and all the accused were convicted with the aid of section 149, Indian Penal Code, for the aforementioned offences. Some of the accused were also convicted for an offence under section 427, read with section 34 Indian Penal Code. They were awarded varying sentences on each count simultaneously directing that the substantive sentences would run concurrently.

3. Karpakkam village was no exception to the ordinary faction-ridden rural community, the dispute vivisecting the village community dating back to 1956 when accused No. 11 Kuppu Naicker who has a well in land bearing Survey No. 102, wanted to lay a pipeline to take water to the field bearing No. 166/2 belonging to his wife, Dhanammal. There was another well sunk by the local Panchayat in Survey No. 170 for the use of the village community and when accused 11 wanted to take water from his well in Survey No. 102, an apprehension was entertained by the residents of the village that there would not be enough water in the well in Survey No. 170 and there would be water shortage. Gripped by this apprehension, a majority of the village community resisted the attempt of accused 11 to take water by laying pipelines. This became a prestige issue which led to attacks and counterblasts. Rival parties were led by accused 11 on one side who was keen to lay the pipeline for flow of water through Survey No. 170 escribed as 'Meykal Poramboke' in which it was proposed to construct a school building, and the opponents were led by P.W. 31. On 4th March, 1967, accused 24 Kumaraswami dug a channel for laying the pipeline through Survey No. 170 whereupon P.W. 31 approached the Collector on 6th March, 1967, objecting to the digging of the channel for laying pipelines in 'Meykal Poramboke' and on his representation on 7th March, 1967, the Collector, suspended the permission granted to accused 11 to lay the pipelines. Accused 11 and his companions ignored the order of the Collector and continued to dig the channel. Apprehending that P.W. 31 and his companions may obstruct, accused 24 instituted Original Suit No. 2216 of 1967 in the Court of the District Munsif, Poonamalle against P. Ws. 31 and 9 others seeking to injunct them from obstructing in any manner in laying the pipelines. Subsequently, the District Revenue Officer passed an order Ex. P-5, on 29th July, 1968, for laying the pipelines along the cart track in Survey Nos. 169 and 170 and the Tahsildar was asked to demarcate the route along which the pipeline should be laid. One T.A. Thandapani, P.W. 5, at the relevant time Revenue Divisional Officer was directed as per order Ex. P-6 to take immediate action to finalise the track along which the pipeline had to be laid and he was directed to visit the village after giving advance notice to both the contending parties. He visited the village on 11th November, 1968 when a written memorandum, Ex. P-1 signed by 63 residents of the village, including P.Ws. 1, 2, 4, 6, 7 and deceased Gajarajan was submitted to him objecting to laying of pipelines. He marked the track along which the line was to be laid by the use of lime powder. A crowd collected at the spot and obstructed marking of the proposed pipeline and part of it was erased as evidenced by Ex. P-20. The officers then withdrew as tension was mounting and P.W. 5 submitted his report Ex. P-7 dated 14th November, 1968. The first outward manifestation of hostility occurred on 24th November, 1968 when P.W. 31 who was returning to the village from Madras, was attacked by a stone hurled at him by accused 5 who was then in the company of accused 1, 4 to 7 and 16 to 19. An information was lodged with the police and P.W. 31 was taken to Royapettah Hospital where he was admitted as indoor patient. This incident appears to be the signal for the tragic events of 27th November, 1968. On that day around 2.30 P.M. deceased Gajarajan, brother of P.W. 31 arrived by bus coming from Madras side and was passing through *Battai* leading to Gangamal Koil on the way to his house and when he was near Casuarina Thope a crowd of about 50 to 60 persons including accused 1-23 and 28 emerged from the Thope and attempted to waylay the deceased. Deceased Gajarajan tried to escape and he was chased and when he was near the well situated near the Teachers' Quarters he was encircled by the crowd and from amongst them he was attacked and beaten by accused 1 with a stick on his right shoulder, by accused 2 on his head with patta knife and by accused 3 on his head with vettu kathi. Deceased

Gajarajan took to his heels and was chased by the crowd and fell down near the house of P.W. 10 where accused 4 and 5 inflicted injuries with patta knife and accused 6 and 7 hurled stones and accused 19 dropped a big stone on Gajarajan. In the incident that occurred near the house of P.W. 10, several prosecution witnesses also suffered injuries at the hands of different accused. It is alleged that accused 1 beat P.W. 6 and P.W. 8 with a stick; accused 2 inflicted injury with patta kathi on P.W. 6; accused 4 caused injuries with patta kathi to P.Ws. 2 and 7; accused 5 attacked P.W.1 with spear and then hurled a stone at him; accused 8 and 10 caused grievous hurt to P.W. 4; accused 19 hurled a stone at P.W.2 and caused grievous hurt; accused 23 caused hurt to P.W. 13; accused 24, 25, 26 and 27 inflicted injuries on P.W. 4. Some of the accused committed mischief. P.W. 32 Subramaniam, A.S.I. Police, Tiruvanmiyur received a telephone message that a riot had occurred at Karpakkam village and before he could get details on phone, the connection was snapped. He rushed with some police constables to the village simultaneously sending intimation for additional police help. When he reached near the house of P.W. 10, he found Gajarajan lying injured. P.Ws.1. 2, 4, 6, 7 and 13 came to the house of P.W 10. He arranged for a conveyance for taking injured Gajarajan and P.W.4 to the General Hospital and then he asked P. Ws. 1, 2, 6, and 7 to accompany him and at the police station recorded First Information Report Ex. P- 2, as narrated by P.W. 1 and registered an offence and commenced investigation. After completing the investigation he submitted challan against 28 accused of various offences. The trial of the accused resulted in acquittal and in appeal by the State, the Court reached the conclusion as hereinbefore recorded.

4. In the appreciation of evidence by the trial Court as well as in appeal against acquittal of the accused by the High Court there is very little or no meeting ground with the unfortunate though unavoidable result that both sides practically read the entire evidence before us and wanted us to reach the conclusion on our own appreciation of evidence. Undoubtedly, in respect of those accused who have been convicted for an offence under section 302/34, Indian Penal Code, there is an appeal to this Court as of right, but in appeals by special leave ordinarily this Court does not undertake to reappreciate evidence. However, in the situation in which we are placed in this case, where the learned Sessions Judge rejects the entire prosecution evidence as unworthy of belief, and the High Court implicitly relies on almost the entire evidence, we could not escape the duty to examine the evidence for the purpose of ascertaining whether there has been any such error of law or fact as to vitiate the findings in the impugned judgment.

5. Here is a case in which in all 28 accused were put up for trial and as many as 34 witnesses were examined, 6 of whom are alleged to have been injured at the scene of occurrence and in all probability in the course of occurrence. The High Court in one paragraph of the judgment (para. 60) agrees with the trial Court that the evidence of prosecution witnesses Nos. 10, 12 and 13 so far as they implicate accused Nos. 8, 9, 10, 16 and 17 fails to inspire confidence but para. 62 of their evidence is accepted as reliable on minor charges but in this background we would exclude their evidence from further consideration. Even then there are 27 accused who are before this Court and there is evidence of 31 witnesses which is to be examined.

6. Where there is a melee and a large number of assailants and number of witnesses claim to have witnessed the occurrence from different places and at different stages of the occurrence and where the evidence as in this case is undoubtedly partisan evidence the distinct possibility of innocent being falsely included with guilty cannot be easily ruled out. In a faction-ridden society where an occurrence takes place involving rival factions it is but inevitable that the evidence would be of a partisan nature In such a situation to reject the entire evidence on the sole ground that it is partisan is to shut one's eyes to the realities of the rural life in our country. Large number of accused would go unpunished if such an easy course is charted. Simultaneously, it is to be borne in mind that in a situation as it unfolds in the case before us, the easy tendency to involve as many persons of the opposite faction as possible by merely naming them as having been seen in the melee is a tendency which is more often discernible and is to be eschewed, and therefore, the evidence has to be examined with

utmost care and caution. It is in such a situation that this Court in *Masalti and others* v. *State of U.P.*[1], adopted the course of adopting a workable test for being assured about the role attributed to every accused. To some extent it is inevitable that we should adopt that course.

7. Before we proceed to look into the evidence it is also necessary to make it clear that whenever in uneventful rural society something unusual occurs, more so where the local community is faction-ridden and fight occurs amongst factions, a good number of people appear on the scene not with a view to participating in the occurrence but as curious spectators. In such an event mere presence in the unlawful assembly should not be treated as leading to the conclusion that the person concerned was present in the unlawful assembly as a member of the unlawful assembly. Vicarious liability would attach to every member of the unlawful assembly if that member of the unlawful assembly either participates in the commission of the offence by overt act or knows that the offence which is committed was likely to be committed by any member of the unlawful assembly in prosecution of the common object of the unlawful assembly and becomes or continues to remain a member of the unlawful assembly. If one becomes a member of the unlawful assembly and his association in the unlawful assembly is clearly established, his participation in commission of the offence by overt act is not required to be proved if it could be shown that he knew that such offence was likely to be committed in prosecution of the common object of the unlawful assembly. But while finding out whether a person was a curious spectator or a member of an unlawful assembly it is necessary to keep in mind the life in a village ordinarily uneventful except for small squabbles where the village community is faction-ridden and when serious crime is committed people rush just to quench their thirst to know what is happening. In this case we will have occasion to point out that there are accused who are convicted with the aid of section 149, Indian Penal Code, but in respect of whom we have no doubt in our mind that they were mere spectators and could hardly be said to be members of the unlawful assembly.

1. (1965) M.L.J. (Crl.) 112: (1965) 1 S.C.J. 605: (1964) 8 S.C.R. 133 : A.I.R. 1965 S.C. 202.

8. At the outset let us briefly analyse the charges framed against the accused. In all distinct and separate charges were framed under 39 heads. Accused Nos. 1, 6, 7, 8, 11, 12, 19, 20, 22, 23, 26, 27 and 28 were charged for an offence committed under section 147, Indian Penal Code, and the remaining accused were charged for an offence under section 148, Indian Penal Code, under heads 1 and 2. Accused 1, 2, 3, 4, 6, 7, 8, 9, 10, 16, 17, 19 and 20 were charged under section 302/34, Indian Penal Code, under head 3 and under head 4 the remaining accused were charged under section 302/149, Indian Penal Code. Accused 1 was charged for having committed an offence under section 323, Indian Penal Code, under heads 5 and 7 for causing hurt to P.W. 6 Subramaniam and P.W. 8 Gangappa Naicker. Accused 2 was charged for committing an offence under section 324, Indian Penal Code for causing hurt to P.W.6 Subramaniam with patta kathi under head 9. Accused 2 was also charged under head 35 for committing an offence under section 427, Indian Penal Code, for committing mischief in the house of P.W. 7 Krishnappa Naicker. Accused 4 was charged under two distinct heads 11 and 13 for committing offence under section 324, Indian Penal Code, causing hurt with patta kathi to P.W.2 Vedagiri and P.W. 7 Krishnappa Naicker respectively. Accused 5 was charged for committing an offence under sections 324 and 323, Indian Penal Code, under heads 15 and 17 for causing hurt to P.W.1, Rajamanickam. Accused 19 was charged for an offence under section 325, Indian Penal Code, for causing grievous hurt to P.W.2 Vedagiri under head 19. Accused 23 was charged for an offence under section 323, Indian Penal Code, for causing hurt to P.W. 13 Kanammal under head 21. Accused 24 was charged for an offence under section 324, Indian Penal Code under head 23 for causing hurt to P.W.4 Gnanamurthi with patta kathi. Accused 25 was charged under the head 25 for an offence under section 324, Indian Penal Code, for causing hurt with iron pipe to P.W. 4 Gnanamurthi. Accused 26 was charged for an offence under section 323, Indian Penal Code, under head 27 for causing hurt to P.W. 4 Gnanamurthi. Accused 27 was charged for committing an offence under section 323, Indian Penal Code, under head 29 for causing hurt to P.W.4 Gnanamurthi. Accused 8 was charged for an offence under section 325, Indian Penal Code, under head 31 for causing grievous hurt to P.W.

4 Gnanamurthi. Accused 10 was charged for an offence under section 325, Indian Penal Code, under head 33 for causing grievous hurt to P.W. 4 Gnanamurthi. Under charges Nos.6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, and 34 all the accused were charged for offences under sections 323, 324 and 325, Indian Penal Code read with section 145, Indian Penal Code. Accused 7, 8 and 10, were charged for an offence under section 427/34, Indian Penal Code, under head 36 for causing mischief in the house of P.W. 16 Karpagammal. Accused 5, 8, and 9 were charged for an offence under section 427/34, Indian Penal Code, under head 37 for causing mischief in the house of P.W.17 Rajammal. Accused 3, 4, 5,6,7,8,9, 10, 15, 16, 17, 19, 20, 21, 23 and 28 were charged for an offence under section 426/34, Indian Penal Code, under head 38 for causing damage to the engine and pump of P.W. 13 Ranganathan. Accused 2, 3, 8, and 9 were charged for an offence under section 427, read with section34, Indian Penal Code, under head 39 for causing mischief in the house of P.W. 18 Andammal.

9. Defence of all the accused except accused 4 was of total denial. Accused 4 admitted the dispute consequent upon attempt of accused 11 to take water by laying pipelines, the visit of P.W. 5 on 11th November, 1968, demarcating of route along which pipelines was to be laid and erasure of it by the opposite faction. It was alleged that they were involved on account of enmity. Accused 4 admitted that when he was examined on 27th November, 1968, by the Medical Officer he had injuries on his person but he did not know who caused them. He had filed a complaint in which he had stated that he was beaten on 27th November, 1968, at 12 noon by a mob consisting of 100 persons including deceased Gajarajan and his relatives.

10. As stated earlier, the learned Sessions Judge found serious discrepancies and contradictions in the evidence of witnesses whom he considered partisan and interested and, therefore, discarded their testimony in entirety and acquitted all the accused of the offences with which they were charged. When the matter came up before the High Court in appeal against acquittal by the State, the High Court convicted accused Nos. 1, 6, 7, 8, 11, 12, 13, 14, 15, 19, 20, 23, 26 and 27 for an offence under section 147, Indian Penal Code, under head I and also convicted accused 3, 4, 5, 9, 10, 16, 17, 18, 21, 24 and 25 for an offence under section 148, Indian Penal Code under head 2. The High Court also convicted accused 1, 2, 3, 4, 5, 6, 7 and 19 for an offence under section 302/34, Indian Penal Code and sentenced each of them to suffer imprisonment for life and confirmed the acquittal of accused 8, 9, 10, 16, 17 and 20 for the said offence under head 3. Consequently, under head 4 the High Court convicted accused 11,12,14,15,18,21,22,23, 24, 25, 26 and 27 for an offence under section 326/149, Indian Penal Code, holding the minimum common object to be one of causing grievious hurt, and sentenced each of them to suffer rigorous imprisonment for a period of 6 months. Accused 1 was convicted for an offence under section 323, Indian Penal Code, under head 7 for causing hurt to P.W. 8 Gangappa Naicker. Accused 2 was convicted under head 9 for an offence under section 324, Indian Penal Code, for causing hurt to P.W. 6 Subramaniam. Accused 4 was convicted for committing an offence under section 324, Indian Penal Code, under two different heads 11 and 13 for causing hurt to P.W. 2 Vedagiri and P.W.7. Krishnappa Naicker respectively. Accused 5 was convicted for an offence under section 323, Indian Penal Code, for causing hurt to P.W. 17 Rajammal under head 17. Accused 19 was convicted for an offence under section 325, Indian Penal Code, for causing grievous hurt to P.W. 2 Vedagiri, under head 19. Accused 23 was convicted for an offence under section 323, Indian Penal Code, for causing hurt to P.W.13 Kannammal under head 21. Accused 24 and 25 were convicted for an offence under section 324, Indian Penal Code, under heads 23 and 25 for causing hurt to P.W. 4 Gnanamurthi with patta kathi and iron pipe respectively. Accused 27 was convicted for an offence under section 323, Indian Penal Code for causing hurt to P.W. 4. Gnanamurthi under head 29. Accused 3, 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 19, 20, 21 and 23 were convicted for an offence under section 427/34, Indian Penal Code, for causing mischief under head 38. Accused 2, 3, 8 and 9 were convicted for an offence under section 427/34, Indian Penal Code under head 39. The High Court convicted all the accused except one substantively charged under corresponding heads, 8, 10, 12, 14, 18, 20, 22, 24, 26 and 30 with the aid of section 149, Indian Penal Code. Charges under heads 5, 6, 15, 16, 27, 28, 31, 32, 34, 35, 36, and 37 were held not proved and the accused were acquit-

-ted for the same. For the various offences under sections 323, 324 and 325, Indian Penal Code read with section 149, Indian Penal Code, sentences of imprisonment varying from three months to six months were imposed upon each of the accused. In reaching this conclusion the High Court largely accepted the evidence of prosecution witnesses except P.Ws. 10, 12 and 13.

11. A very detailed argument was addressed to us by Mr. Chitaley on behalf of accused Nos. 1, 2, 3, 4, 5, 6, 7 and 19 who have been convicted for an offence under section 302/34, Indian Penal Code. It was said that accused 1 to 7 and 19 have been convicted for an offence under section 302/34, Indian Penal Code, by the High Court not on the basis of any constructive or vicarious liability but on the finding that each one actively participated in the assault on deceased Gajarajan. Each one is assigned a particular role and, therefore, unless participation by the overt act is satisfactorily established it cannot be said that the charge is brought home to the particular accused. There is considerable force in this submission. It is all the more so because the High Court convicted the remaining accused under section 326/149, Indian Penal Code, which would mean that the High Court did not accept the prosecution case that the common object of the unlawful assembly was to commit murder of deceased Gajarajan. We would, therefore, have to analyse the evidence about overt act attributed to each of accused 1 to 7 and 19.

12. Mr. Mulla on the other hand urged that this Court should bear in mind that there was strong motive for the accused to cause harm to deceased Gajarajan; that in all the deceased and the prosecution witnesses suffered as many as 64 injuries including 29 by deceased, 14 by P.W. 2,12 by P.Ws. 4, 5 by P.W. 7, 2 by P.W. 6 and one each by P.Ws. 1 and 8. It was pointed out that from amongst the 29 injuries suffered by the deceased, three were individually fatal and three cumulatively fatal and from amongst those three injuries which were cumulatively fatal some could be caused by pelting stones. It was pointed out that the incident is not in two parts but it was one continuous transaction and the prosecution was not to benefit by dividing it into two parts. He said that at any rate, Ex. P-2, does corroborate P.W.1 in respect of the incident at the well. Mr. Mulla strenuously contended that the evidence of P.W. 1 on its own is trustworthy and it is further assured by being corroborated by Ex. P-2 and the medical evidence provides corroboration to the evidence of P.W. 1. It was urged that the matter should be looked at from a broad spectrum in that there was long-standing feud between the parties and the incident of 24th November, 1968 has to be properly appreciated. Along with this the fact that the First Information Report was lodged soon after the occurrence and that in respect of it some contradictory suggestions have been made would not detract from its credibility. He said that the approach should be : Is the story on the whole reliable and whether appreciation of evidence by the High Court is fair and balanced?

13. It was urged that when participants in assault are being convicted with the aid of sections 34 and 149, Indian Penal Code, the question of individual conduct is hardly relevant at all. Lastly, he said that if the Court is not satisfied about the role attributed to accused 19, even though the stone weighing about 4 kg., is found at the scene of occurrence, because the medical evidence may not justify the allegation of dropping of the stone on the head of the deceased, the Court may give him the benefit of doubt but aside of that, the Court may only examine special features in respect of the role attributed to individual accused with regard to injuries being caused to some prosecution witnesses and decide whether on those specific charges any one is entitled to benefit of doubt.

14. Mr. Chitaley submitted that motive alleged is such that it may cut both ways. Long-standing feud may erupt into open hostility and assault. Simultaneously it may provoke victims to rope in as many members of the opposite faction as could be conveniently inter-woven in the main fabric of the prosecution case.

15. The motive alleged for the offence is that there were well-divided factions in the village—one led by accused 11 and the other led by P.W. 31. All the accused, apart from belonging to the faction led by accused 11, are inter-related. Accused 2, 3, 24 and 25 are sons of accused 11. Accused 9 and 10 are the sons of accused 8 who is the brother of accused 11, and accused 26 is brother of accused 11. Accused 13 and 14 are the sons of accused 12 who is the brother of

accused 11 and accused 27 is the wife of accused 12. Accused 1, 4, 15 and 23 are the sons of one Kullappa Naicker. Accused 18 and 19 are the sons of accused 4. Accused 6, 7, 16 are the sons of accused 15. Accused 22 is wife of accused 23 and accused 5 is the son of accused 23. Thus, by and large all the accused are near relations of each other. To some extent that is true of the prosecution witnesses also. P.W. 31 is the head of the Panchayat and was also the leader of the faction. Deceased Gajarajan was the brother of P.W. 31 and P.W. 4. P.W. 2 is the real brother of P.W. 1. The niece of P.W. 7 is married to P.W. 2. The sister of P.W. 4 is married to the son of P.W. 1. P.W. 13 is the wife of the elder brother of P.W. 1. P.W. 16 is the wife of the maternal uncle of P.W. 1. P.W. 9 is the cousin of P.W. 1. P.W. 12 is the wife of P. W. 9 and she is the sister of P.W. 31 and deceased Gajarajan. P.W 19 is the elder sister of P.W. 31, the deceased and P.W. 4. Deceased was married to the daughter of P.W 19. P.W. 20 is the wife of P.W 4. P.W. 21 is the wife of P.W. 31. Thus, the prosecution witnesses are also more or less near relations of each other. The cause of discord between the two factions dates back to 1956 when accused 11 wanted to take water by laying pipelines from his well in Survey No. 102 to the field bearing Survey No. 166/2 belonging to his wife and this was objected to by a large number of villagers alleged to have been led by P.W. 31. Since then accused 11 made strenuous efforts to get permission for laying the pipelines and P.W. 31 and his supporters stoutly resisted the same. The entire history of discord is clearly set out in the evidence of P.W. 5. Additional Revenue Officer, T.A. Thandapani and to some extent it is supported by documentary evidence. The Collector granted the permission to lay the pipeline but he suspended it on objection by P.W. 31 and his supporters. Subsequently, by Ex. P-5 he directed pipeline to be laid along the cart track and further directed the Tahsildar to demarcate the route and the witness P.W. 5 was directed to visit the village after giving notice to both the parties and actually the witness visited the village on 11th November, 1968 when Ex. P-1 signed by 63 local residents including P.Ws. 1, 2, 4, 6, 7 and deceased Gajarajan was submitted to him. He demarcated the route along which the pipeline was to be laid and a large crowd had collected there. About 100 persons obstructed the marking of the line. Some people mischievously behaved by obliterating the line whereupon witness Thandapani recorded the statement Ex. P-20 and submitted his report Ex. P-7. There is no dispute that such an event did occur. Amongst others, accused 11 has admitted these facts in his statement under section 313, Criminal Procedure Code. The only point submitted by Mr. Chitaley on behalf of the accused was that Gajarajan was not one of the persons who participated in obstructing demarcation of the line and on the contrary the evidence shows that he was in a conciliatory mood. There is some substance in the submission that Gajarajan did not participate in erasing the line and in fact he persuaded his compatriots to desist from such a course and not to obstruct the officers discharging their duty. The fact, however, remains that this dispute about taking water and laying pipeline had divided the local village community into two rival factions and one faction was led by P.W. 31, the head of the local Panchayat. Gajarajan was his brother. In this background, the submission that there was no motive to cause harm to Gajarajan cannot be accepted. There was enmity and bitterness between the two factions. Gajarajan belonged to one faction. Accused belonged to opposite faction. Therefore, this dispute about taking water and the consequent vivisection of the local village community would establish some motive on the part of the accused to cause harm to Gajarajan. But then in this background the Court has to be careful to find out whether this very fact may not induce some witnesses to involve as many persons of the opposite faction as possible.

15. It was said that the High Court was in error in placing implicit reliance on the evidence of P.W. 1 as corroborated by Ex. P-2 and the evidence of P.Ws. 6 and 9. The High Court has observed in paragraph 52 of its judgment that the testimony of P.W. 1 corroborated by the contents of Ex. P-2 is wholly credible and reliable and the High Court has no hesitation in placing total reliance on his testimony. Mr. Chitaley took serious exception to this certificate awarded to P.W. 1 and contended that there are a number of infirmities in his evidence and it would be hazardous to place implicit reliance on his testimony. Simultaneously it was said that Ex. P-2. the First Information Report has come into existence in such cir-

cumstances and contains such details and omits such vital facts of the prosecution case that it could not render credence to the evidence of P.W. 1 and it was not worthy of reliance.

17. P.W. 1 Rajamanickam is a very material witness in this case. According to him, on the date of occurrence *i.e.*, 27th November, 1968 around 1 P.M. he returned to his house from his field and after taking food while he was on the way to the field again *via* Perumal Koil Street he saw deceased Gajarajan alighting from a bus which arrived from Madras side and proceeded towards his house and when he was passing through the ***battai*** leading to Gangamma Koil he saw accused 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 28 coming out of Casuarina Thope along with several others and they waylaid deceased Gajarajan who was proceeding towards his house. Gajarajan started running and he was chased by the aforementioned persons and when Gajarajan reached near the well situated near the Teachers' Quarters at Karpakkam, accused No. 1 beat Gajarajan on his right shoulder with a stick, accused 2 inflicted an injury on the head of Gajarajan with patta knife and accused 3 inflicted an injury on the head of Gajarajan with vettu kathi. After receiving these injuries Gajarajan ran towards the house of P.W. 10, Govindaraja Naicker. Witness P.W. 1 proceeded near the ***sravanam*** of the house of Govindaraja Naicker and concealed himself behind the *sravanam*. The witness deposed that Gajarajan fell down near the house of P.W. 10 Govindaraja Naicker and at that time accused 4 caused an injury with patta knife on the right hand side of Gajarajan. He saw accused 5 causing an injury with patta knife to Gajarajan on his right thigh. He also saw P.W. 2 Vedagiri coming running to the place and accused 4 caused two injuries on the head of P.W. 2 with patta kathi. He also saw P.W. 6 Subramaniam emerging from his house and accused 2 inflicted an injury with patta kathi on the left leg of the latter. P.W. 6 Subramaniam ran away from that place. He further stated that accused 5 Ramu *alias* Raman s/o. accused 23 attacked him with a spear but he escaped the blow and in the process his shirt was torn. At that time accused 5 hurled a stone at him which hit him on his right knee. P.W. 1 stated that he entered the house of Krishnappa Naicker and bolted the door. After some time he emerged from that house and when he came out he saw accused 6 Guruswami and accused 7 Vishwanathan hurling stones at Gajarajan. The witness further stated that he also saw accused No. 19 bringing a stone and dropping it on the head of deceased Gajarajan at that time. The witness has been cross-examined at great length and we are constrained to observe that the learned Sessions Judge hardly bothered to determine whether the questions put in cross-examination were permissible or not. One curious practice not known to law adopted by him was that whenever a witness was asked about an omission with reference to the statement of the witness recorded by the investigating officer under section 161, Criminal Procedure Code, the learned Public Prosecutor would make a statement whether the statement referred to in evidence was to be found or was not to be found in the statement under section 161, Criminal Procedure Code, and no attempt was made to prove the omission. Such concession for proof of contradiction or omission lacks support of law and is likely to be unfair to the witness in that when the investigating officer is questioned with regard to the contradiction or omission a further opportunity will be available to him to explain the contradiction or omission.

18. Mr. Chitaley urged that the witness belongs to the faction of P.W. 31. That does not appear to be in dispute. The witness appears to have suffered one injury by a stone hurled by accused 5. He was examined by P.W. 11 Dr. Ramachandran. The witness has suffered a contused wound over the inner aspect of right leg just 2 inches below the knee of the size of $2\frac{1}{4}\times1\frac{1}{2}$ cms. Mr. Chitaley urged that witness P.W. 1 is a partisan witness belonging to the faction led by P.W. 31. He admitted that he instituted a criminal complaint against the person belonging to the accused party, including accused 1, 2, 3, 6, 7, 8, 9, 11, 12, 13, 15, 16, 17, 18 and 26. A Criminal Case No. 822 of 1965 was registered on the basis of his complaint and in that case the accused were acquitted. He also admitted that accused 11 had instituted 2-3 criminal cases against him in the criminal Court. He also admitted that accused 2 Raja Ram had instituted a criminal case against him. He further admitted that accused 12 had filed a criminal case against him and P.W. 31. He

is a member of the Panchayat of which P.W. 31 is the President. This evidence is sufficient to show that he belongs to the faction of P.W. 31. One noteworthy feature of his evidence is that he admitted that witnesses Subramaniam, Krishnammal and Pattammal are related to him and that they will depose as per his direction and instigation. The type of answer elicited in cross-examination may not be given its full weight. Added to this is the fact that he is a signatory to the memorandum dated 11th November, 1968, Ex. P-1 submitted to Revenue Divisional Officer along with a number of other persons objecting to the grant of permission to lay pipeline for taking water as prayed for by accused 11. It would unmistakably appear that the witness belongs to the faction of P.W. 31 and hence a partisan witness. Unfortunately the High Court did not examine this aspect before reaching the conclusion that his testimony is absolutely trustworthy. It is not for a moment suggested that the evidenceses of partisan witnesse must be discarded on that ground alone. Times without number this Court has said that that would not be a correct approach. That put the Court on guard to scrutinise their evidence with more than ordinary care, vide *R. Kondaiah and others* v. *State of Andhra Pradesh*[1]. It must focus its attention on whether there are discrepancies in the evidence; whether the evidence strikes the Court as genuine, and whether the story as narrated is probable. Judicial approach has to be cautious in dealing with such evidence. The circumstances surrounding the presence of this witness at the time of the occurrence are purely fortuitous coupled with the fact that he is a partisan witness and hence his evidence will have to be examined with great care and caution.

19. In accepting the testimony of P.W. 1 the High Court was impressed by the fact that he is corroborated by Ex. P-2, the First Information Report in this case. Evidence of P.W. 32 Subramaniam, Taluk Sub-Inspector would show that on receipt of telephonic message he rushed to the scene of occurrence. Soon thereafter armed police reinforcement arrived. He sent deceased Gajarajan and P.W. 4 Gnanamurthi to the General Hospital in a taxi and then he took P Ws. 1, 2, 6 and 7 in the police van to the police station. On reaching the police station he recorded Ext. P-2, the First Information Report as lodged by P.W. 1. Two suggestions were made with regard to the veracity of the contents of Ex. P-2. It was said that it was lodged by P.W. 1 in consultation with P.W. 31 who was already at Royapettah Hospital, and the details were settled in consultation with P.Ws. 2, 6 and 7 while travelling by police van on the way to the police station. Cross-examination of P.W. 1 itself reveals that part of the information contained in Ex. P-2 is stated by him on the information received by him from persons who had suffered injuries and not of his personal knowledge. The High Court has reproduced the entire Ex. P-2 in its judgment. In Ex. P-2 the names of accused 1 to 23 are mentioned though there is some controversy about the name of accused 3 being found in Ex. P-2. The weapon carried by each of them is also mentioned. But it was contended that while giving evidence in the Court P.W. 1 over and above described the role of individual accused and the weapon wielded by him and also neatly pin-pointed the seat of each injury. In the First Information Report Ex. P-2 it is not stated as to on what part of the body the blow by particular accused landed. We are not inclined to attach undue importance to the fact that in the First Information Report the witness has not stated as to on what part of the body the blow fell. What is worthy of note is that according to the winess 50-60 persons emerged from Casuarina Thope and chased deceased Gajarajan and when Gajarajan was near the well he was attacked by accused 1, 2, 3, and when Gajarajan reached a further distance of 225 ft. he fell down near the house of P.W. 10 Govindaraja Naicker but till then no other accused could attack him. The omission of the names of accused 24, 25, 26 and 27 in Ex. P-2 is glaring. It becomes all the more glaring because accused No. 24 is a son of accused 11, the latter being the leader of the opposite faction. P.W. 6 witnessed accused 24 causing injury to P.W. 4 with patta knife. P.W. 6 was in the same police van by which P.W. 1 travelled to the police station and their description about the occurrence is similar and yet the name of accused 24 does not figure in the First Information Report Ex. P-2. On an overall view of these circumstances it would be

1. (1975) 2 S.C.J. 499: (1976) M.L.J. (Crl.) 21: (1976) 1 An.W.R. (S.C.) 1: (1975) S.C.C. (Crl.) 213: (1975) 3 S.C.C. 752: A.I.R. 1975 S.C. 216.

unsafe to place total reliance on the contents of Ex. P-2. Undoubtedly it would to some extent lend assurance to the evidence of P.W. 1 but both will have to be taken with an amount of caution.

20. The High Court then examined the evidence of P.Ws. 6 and 9 which according to the High Court would lend assurance to the evidence of P.W. 1. P.W. 6 Subramaniam stated in his evidence that on the date of the occurrence around 2.30 P.M. when he was sitting in the verandah he heard noise coming from the side of the school and he saw deceased Gajarajan coming running by the side of the Teachers Quarters. He also saw 50 persons including all the accused coming running armed with sticks, knives, pipes, etc. He deposed that these persons waylaid Gajarajan. The witness developed fear and got into his house and bolted the door from inside the house. He then heard the cries of Gajarajan "*ayyo ayyo*' coming from near the house of P.W. 10 Govindaraja Naicker whereupon the witness opened the door and came out to see what had happened. He deposed that he saw Gajarajan lying in front of the house of P.W. 10 and accused 4 was standing armed with knife. Accused 5 Ramu *alias* Raman inflicted an injury with knife on the right thigh of Gajarajan. Accused 21 beat the witness with a stone on the middle of the chest but he did not sustain any external injury. The witness further deposed that accused 2 Rajaram came running with a patta knife and inflicted an injury on his calf muscle with the patta knife. P.W. 6 fell down as he suffered a bleeding injury on his leg. He deposed that he saw P.W. 1 standing near the house of P.W. 10 Govindaraja Naicker, and he saw accused 2, 5 and 21 chasing P.W. 1 by the back side of Govindaraja Naicker's house. He also deposed that P.W. 4 was coming running towards the house of Govindaraja Naicker and he also saw accused 24-27 coming running from Munuswami Naicker's house. He deposed that accused 24 inflicted injury with patta knife on the head of P. W. 4 and accused 25 beat P.W. 4 with an iron pipe. Accused 26 pelted a stone on P.W. 4 which hit him on his stomach. He stated that accused 27 was having a bag of stones and that they all went away towards the well of accused 11. Now, unfortunately, the High Court observes in paragraph 45 that on a total consideration of the evidence of P.W. 1, corroborated by the testimony of P.Ws. 9 and 6 and the contents of Ex. P-2, the offence under section 302 read with section 34, Indian Penal Code, has been brought home against accused 17 and 19. Very unfortunately this witness P.W. 6 does not say one word about the attack by accused 1, 2 and 3, on Gajarajan near the well. He made a very general statement that a crowd of 50 persons including all the accused came running armed with knives, sticks and pipes. This witness could be said to lend assurance to the evidence of P.W. 2 about accused 4 and 5 being near deceased Gajarajan when he was found lying near the house of P.W. 10. The witness does not say about the accused 6, 7 and 19 causing injury by stones to Gajarajan. We are constrained to observe that the High Court without examining the evidence of the witness has made a bald statement unsupported by evidence that the evidence of P.W. 6 lends assurance to the evidence of P.W. 1. We may also point out that while the witness says he saw accused 4 standing near Gajarajan with a knife he does not say he saw him causing injury to the deceased.

21. Turning now to the evidence of P.W. 9 Narayanaswami it should be pointed out that he is the husband of the sister of deceased Gajarajan. He deposed that on the date of the occurrence when he was coming with his cattle to his house he saw deceased Gajarajan alighting from a bus. He also saw a large number of persons rushing out of Casuarina Thope raising the alarm '*Pidida*'. The witness stated that when deceased Gajarajan was near the drinking water well, he was waylaid by accused 1 who beat him with a stick. He also saw accused 2 causing injury with patta kathi and accused 3 causing injury with vettu kathi to the deceased. He deposed that as stones were being hurled he himself ran to the house of witness Doraiswami and concealed himself in the house and he came out after the police arrived at the scene of occurrence. Apart from the fact that this witness is a near relation of the deceased, his presence at the scene of the occurrence is very furtuitous. He not only belongs to the faction of P.W. 31 but is a near relation of P.Ws. 31, 4 and deceased Gajarajan who are brothers. In his cross-examination he stated that he did not know whether the blows inflicted by accused 2 and 3 fell on the deceased or not. A contradiction was brought on record with reference to the police statement in which he has merely used the word

'knife' and not 'patta kathi'. Looking to the fact that the witness is a near relation of the deceased, that to some extent he is a chance witness and the contradiction from his police statement, his evidence will have to be taken with an amount of caution.

22. As pointed out earlier, the High Court has implicitly relied on the evidence of P.W.1 on the ground that it is corroborated by Ex. P-2 and the evidence of P.Ws. 6 and 9. The expanse of this statement is wide of the mark. We have analysed the entire corroboratory evidence and it appears that the corroboratory evidence does not render the evidence of P.W. 1 wholly trustworthy. Evidence of P.W. 1 will have to be scanned in respect of each accused he seeks to implicate to ascertain against whom it is satisfactorily corroborated by other evidence. We will, therefore, analyse the evidence against each of the aforementioned accused.

23. Accused No. 1 Muthu Naicker was identified as being in the crowd that chased Gajarajan by P.Ws. 1, 2, 9, 18 and 22. Out of these witnesses, P.W. 1 saw him inflicting an injury with the stick on the shoulder of Gajarajan. P.W. 2 claimed to identify accused 1 by his voice. P.W. 9 also says that accused 1 beat deceased near the well but he did not know whether the blow landed on him or not. His name is to be found mentioned with the weapon wielded by him in Ex. P-2. Even if we apply what has been described as mechanical test in a case of this nature where at least three persons identified him in the unlawful assembly and he was armed with a weapon and was seen by two witnesses wielding the weapon, and the medical evidence of injury on the deceased corroborates the fact that a stick blow had landed on the right hand of the deceased, his presence in the unlawful assembly and participation in the assault on the deceased is unmistakably established and the evidence against him deserves to be accepted.

24. Accused 2 Raja Ram was identified in the unlawful assembly by P. Ws. 1, 6, 9, 17, 18, 20 and 22. P.W. 1 says that he saw accused 2 armed with patta kathi and inflicting an injury on the right side of the head of deceased. He is also shown to have caused an injury on the leg of P.W. 6. At least P.W. 6 who has suffered an injury, as borne out by medical evidence, by a sharp edged weapon, was in a position to identify his assailant. P.W. 9 refers to his presence in the crowd with a knife which he has described as patta knife. The presence of this accused in the unlawful assembly and participation in the assault is very affirmatively established and the High Court was right in accepting the evidence against him.

25. Accused 3 Vedagiri was seen in the assembly by P.Ws. 1, 9, 17, 20, 21, 22 and 23. Further P.W. 17 and 18 speak of his having entered the house of P.W. 18 and caused damage to the goods. P.W. 19 speaks of his having caused damage to the pump set and doors and windows though in this respect he has been contradicted by the police statement. Now, applying the test we have evolved in the facts and circumstances of this case, the presence of this accused is referred to by at least five witnesses and others refer to his activity which occurred at or about the time of occurrence. However, there is a serious lacuna in the evidence against him and the High Court appears to have completely overlooked it and this mainfest error emanates from the fact that the copy of the First Information Report which the High Court has used for reproduction in its judgment materially differs in respect of this accused from the copy supplied to us in Vol. V, of the record. We are unable to find out how such a glaring discrepancy in the two copies has occurred but we would rely on the copy supplied to us in Vol. V. In view of this, Mr. Chitaley rightly urged that the name of accused 3 is not to be found in the First Information Report and this fact was not controverted by Mr. Mulla, learned counsel for the respondent State. The High Court had reproduced the entire Ex. P-2 in paragraph 43 of its judgment. In the middle portion of Ex. P-2 as reproduced by the High Court at p. 1426 of the record where P.W. 1 describes the assault it reads as under :

> "They obstructed Gajaraja Naicker near the teachers' quarters. Muthu Naicker (accused 1) beat Gajarajan with a stick. Rajaram (accused 2) son of Kuppu Naicker (accused) cut him with the patta knife. Vedagiri (accused 3) also cut him with a vettu knife Gajaraja Naicker managed to came running and fell down in front of the house of Govindaraja Naicker P.W. 10)."

26. Now, when we refer to the copy of the first information report, supplied to the Court at page 5, Vol. V. it reads as under :

"They waylaid him near Teachers' Quarters. Muttu Naicker (A-1) beat Gajaraj with a stick. Rajaram, son of Kuppu Naicker (A-2) cut him with a patta knife. Gajaraj escaped, came running and fell down before Govindaraj Naicker's (P.W.10's) house."

27. In any other portion of the First Information Report Ex. P-2 as set out in Vol. V there is no reference to accused 3. Therefore, it appears crystal clear that the name of accused 3 is not mentioned in the First Information Report. Now, if P.W. 1 in the material witness and he has vividly described the assault on the deceased at the well where accused 3 is said to have caused injury to deceased and yet in the First Information Report Ex. P-2 he has not mentioned the name of accused, 3, it would be hazardous to accept the evidence against him as being present in the unlawful assembly and participating in the assault. It becomes all the more difficult because P.W. 6, who is the other witness according to the High Court as affording corroboration to the evidence of P.W. 1, does not say anything about accused 3 causing any injury to deceased Gajarajan. It thus becomes crystal clear that the name of this accused is not mentioned in the First Information Report Ex. P-2 and the evidence of P.W. 1 is not corroborated by the evidence of P.W. 6 and P.W. 9 is not clear about what this accused is supposed to have done. In these circumstances we are of the opinion that accused 3 is entitled to the benefit of doubt with regard to the charge under section 302/34, Indian Penal Code.

28. Accused No. 4 was seen in the unlawful assembly by P.Ws. 1, 2, 6, 7, 8, 18 and 22. About the presence of accused 4 in the unlawful assembly there is unimpeachable evidence. P.W. 33 D.D. Srinivasan, Sub-Inspector of Police in his evidence stated that after he learnt of the occurrence at Karpakkam village, he rushed police constables to that village and when he reached there at 4.45. P.M. he found armed Reserve Police personnel present there. P.W. 32 Subramaniam, Taluk Sub-Inspector was not in the village. This witness P.W. 33 started looking round in the village and when he reached Kaliamman Koil Street, he found accused 4 Singara Naicker lying there with injuries on his person and he was not in a position to speak. The witness at once sent accused 4 in a cart to the hospital for treatment. Accused 4 was examined by P.W. 15 Dr. Pragedeeswaran and the certificate of injury, Ex. P-15 shows that accused 4 had suffered a minor abrasion over ilium and lacerated wound on right mandible. Accused 4 in his statement under section 313, Criminal Procedure Code, stated that he had suffered the injury but did not know who caused the injury to him (*vide* question No. 43). Again it must be remembered that this accused gave two blows with patta kathi to P.W. 2 and his presence and causing injury to P.W. 7 is spoken by P.W. 7 though of course on this point an omission was brought on record in the evidence of P.W. 7 with reference to his evidence in the committing Magistrate's Court. Mr. Chitaley also commented on the fact that while the medical officer had asked this accused as to how he suffered the injury, in the case of injury to P.W 7 at the time of examination by the Medical Officer he has not stated that he suffered the injury at the hands of accused 4. In fact, the evidence against this accused satisfactorily establishes his presence in the unlawful assembly as also his participation in the assault on the deceased.

29. Accused 5 is alleged to have caused an injury with patta kathi on the right thigh of the deceased. This is spoken to by P.Ws. 1, 2 and 6. P.W. 17 refers to his presence in the crowd but failed to identify him in the Court and, therefore, that evidence would not be of any assistance to the prosecution. P.Ws. 18, 19 and 22 have seen this accused in the unlawful assembly. With regard to the injury alleged to have been caused by this accused there is corroboration in the form of medical evidence. There is further the evidence of P.W. 1 that this accused tried to give him a stab blow with his spear but he warded off the blow and in the process his shirt was torn. In this connection it is clearly stated in the First Information Report Ex. P-2 that accused 5 attempted to thrust a spear in his stomach but he escaped and his shirt was torn and accused 5 then hurled a stone which hurt P.W. 1 on the right knee. On the question of injury on his right leg, P.W. 1 is corroborated by the medical evidence. It is also stated in Ex. P-2 that accused 5 gave a blow with patta kathi to the deceased. Therefore, on the identity and presence of this accused evidence of P.W. 1 is corroborated by Ex. P-2, by the medical evidence as well as by the evidence of P.Ws. 18, 19 and 22 as having seen him in the unlawful assembly. His pre-

sence and participation is clearly established by more than three witnesses and, therefore, the charge is brought home to him.

30. Accused 6 and 7 are alleged to have pelted stones at deceased Gajarajan and caused injuries to him. On the important point of pelting stones at Gajarajan there is evidence of P.W. 1 alone against accused 6 and 7 and even in respect of that part of his evidence the learned Sessions Judge has noted that after P.W. 1 described the entire incident and then referred to his having concealed himself in the house of Krishnappa Naicker, and thereafter the witness volunteered that accused 6 and 7 pelted stones. That is an infirmity in the evidence of this sole witness on the question of pelting stones against accused 6 and 7. P.W. 19 has stated that he had seen accused 6 brandishing an iron pipe but a contradiction is brought on record in his evidence which shows that in the police statement he had referred to a stick in the hand of accused 6. P.Ws. 20, 22 and 24 referred to the presence of accused 6 in the crowd. Similarly, P.Ws.19, 20 and 22 referred to the presence of accused 7 in the crowd. As pointed out earlier, the High Court convicted accused 6 and 7 for the offence under section 302/34, Indian Penal Code, not on the ground that they were members of the unlawful assembly but on the ground that they shared the common intention of accused 1, 2, 3, 4, 5, and 19 to commit the murder of Gajarajan and that this common intention is manifested on account of overt act of pelting stones by accused 6 and 7 at deceased Gajarajan. If the conviction thus rests on the alleged overt act of pelting stones, that aspect is spoken to by P.W. 1 alone. It was, however, said that on this aspect P.W 1 is corroborated by Ex. P-2. The statement in Ex. P-2 on this point is slightly ambiguous. It is stated that accused 6 Guruswami threw stones at him and accused 7 Viswanathan also threw stones. Whether the stones did hit Gajarajan or not is nowhere spoken to in Ex. P-2. And again, as stated earlier, P.Ws. 6 and 9 did not say one word against accused 6 and 7 though the High Court observed that the testimony of P.W 1 is rendered wholly trustworthy on being corroborated by Ex. P-2 and the evidence of P.Ws. 6 and 9. It would thus appear that in respect of accused 6 and 7 such corroboration is not forthcoming. It was, however, said that the evidence of P.W. 3 Dr. C.B. Gopalakrishnan would clearly show that deceased Gajarajan had suffered injruies Nos. 5, 10, 15 and 18 by being struck by stones. When deceased Gajarajan fell down near the house of P.W. 10 the evidence of P.W 1 is that he was encircled by members of the unlawful assembly. If thereafter accused 6 and 7 pelted stones at Gajarajan it is difficult to believe that they would hit Gajarajan and even P.W. 1 does not say that the stones hurled by accused 6 and 7 did hit Gajarajan. In this state of evidence we are not satisfied that accused 6 and 7 participated in the assault on Gajarajan by pelting stones and, therefore, the charge under section 302/34, Indian Penal Code, is not brought home to them.

31. The last in this group of accused is accused 19 who is convicted for an offence under section 302/34, Indian Penal Code. We must frankly say that the High Court was in serious error in convicting accused 19 for an offence under section 302/34, Indian Penal Code, on the allegation that he brought a stone weighing about 4 kg. and dropped it on the head of deceased Gajarajan. In the First Information Report. Ex. P-2, P.W. 1 has stated that accused 19 carried a stone and threw it on the head of Gajarajan. This one sentence in the First Information Report has raised considerable doubt in our minds about the truthfulness of the averments made in the First Information Report which according to the High Court was recorded as expeditiously as possible and would, therefore, render corroboration to the evidence of P.W. 1. P.W. 1 in his evidence has stated that accused 19 dropped the stone on the head of deceased Gajarajan and a stone which was recovered, M.O. 2, from the scene of occurrence was identified by the witness to be the one which was dropped by accused 19 on the head of Gajarajan. P.W. 3 Dr. Gopalakrishnan who has been subjected to cross-examination on this facet of the case, has admitted in cross-examination that if a man stood near deceased Gajarajan and dropped a stone about 4 kg. in weight, he would expect that the skull would be broken into multiple bits, and he further stated that if the stone is thrown with great force, the skull would be crushed. If this part of evidence is correlated to the external injuries found on the person of deceased Gajarajan it would appear that the evidence of the witness P.W. 1 on the question of dropping stone is materially contradicted by the medical evidence. It

was, however, said that P.W. 2 Vedagiri has stated that accused 19 pelted a stone at him which caused an injury on his left hand finger. That may at best show that accused 19 was present at the scene of occurrence but that would not render corroboration to the evidence of P.W 1 on the role attributed by him to accused 19. P.Ws. 19, 22 and 23 refer to his presence in the crowd. The analysis of the evidence would show that P.W. 1 is the only witness on the question of participation in the assault by accused 19 on deceased Gajarajan and that part of his evidence was added by him volunteering the information after he had described the whole incident which might show his anxiety that he may not miss involving accused 19 in the occurrence. Apart from that, the greater infirmity in the evidence is that he is contradicted by the medical evidence. Mr. Mulla, learned counsel for the respondent also submitted that if the medical evidence renders the statement of P.W 1 against accused 19 unworthy of belief we may give him the benefit of such reasonable doubt as we may entertain arising from the state of evidence. Therefore, in this state of evidence we feel that the High Court was not justified in holding that the charge under section 302/34, Indian Penal Code, is brought home to accused 19 and he is entitled to be acquitted of this charge.

32. The analysis of the evidence keeping in view the appreciation of evidence by the High Court would show that the charge under ection 302/34, Indian Penal Code, is brought home to accused 1, 2, 4 and 5 only and the charge against accused 3, 6, 7 and 19 fails.

33. At this stage we are faced with an anomalous situation arising from the judgment of the High Court. We are satisfied that accused Nos. 3, 6, 7 and 19 did not participate in the assault on deceased Gajarajan. They will, therefore, be in the same position as the High Court held in respect of accused Nos. 8, 9, 10, 16, 17 and 20 whose participation in the assault on deceased Gajarajan as alleged by the prosecution was not held proved by the High Court. Now, under head No. 4, accused Nos. 11-15, 18 and 21-28 were charged for an offence under section 302 read with section 149, Indian Penal Code, no such charge in the alternative against accused Nos. 1 to 10, 16, 17, 19 and 20 was framed. While convicting accused Nos. 11-15, 18 and 21-27 for an offence under section 326/149, Indian Penal Code, those who were acquitted of the charge under sections 302/34, Indian Penal Code, *viz.*, accused Nos. 8, 9, 10, 16-17, 20 were not convicted on the alternative charge under section 302 read with section 149, Indian Penal Code, even though they were held to be members of the unlawful assembly, a fact discernible from the finding recorded on charges 1 and 2 in which accused 8 and 20 have been convicted for an offence under section 147, Indian Penal Code, being members of an unlawful assembly and committing the offence of rioting, and accused 9, 10, 16-17 have been convicted for an offence under section 148, Indian Penal Code, in that they committed an offence of rioting armed with deadly weapons. Yet, when it came to the question of vicarious liability for an offence under section 326/149, Indian Penal Code, accused 8, 9, 10, 16, 17 and 20 have not been convicted for the same though they are held to be members of the unlawful assembly. It may be that the High Court acquitted them of the charge under section 302/34, Indian Penal Code, on the ground that they were not shown to be participants in the assault on Gajarajan, yet if the High Court recorded a finding that the minimum common object of the unlawful assembly was to cause grievious hurt and if the members of the unlawful assembly knew that such offence was likely to be committed in prosecution of the common object of the unlawful assembly, then consistent with that finding the High Court could not have failed to record a finding against accused 8, 9, 10, 16, 17 and 20 convicting them for an offence under section 326/149, Indian Penal Code. But that having not been done, by necessary implication the acquittal of accused 8, 9, 10, 16, 17 and 20 for the offence under section 326/149, Indian Penal Code, has become final as it has not been challenged by the State by way of appeal. We cannot convict them for the offence under section 326/149, Indian Penal Code, in this appeal by the accused against their conviction and sentence for other offences. Accused Nos. 3, 6, 7 and 19 who according to us are not shown to have participated in the assault on deceased Gajarajan should be similarly treated in respect of charge No. 4. Suffice it to say that no charge under section 302/149, Indian Penal Code, was framed against them.

34. Under charge No. 4, the High Court has convicted accused 11-15, 18, 21-27 for an offence under section 326/149, Indian Penal

Code, observing that these accused at least must have known that an offence under section 325, (see original), Indian Penal Code, was likely to be committed in prosecution of the common object of the unlawful assembly, particularly in view of the fact that Gajarajan was attacked and beaten by accused 1, 2, 3, 4, 5, 6, 7 and 19. After holding that these accused must have known that at least an offence of grievous hurt was likely to be committed in prosecution of the common object of the unlawful assembly and after referring to section 325, Indian Penal Code, the High Court convicted the aforementioned accused under section 326/149, Indian Penal Code. Apart from that, once the High Court after holding that accused Nos. 8, 9, 10, 16, 17 and 20 were members of the unlawful assembly though they were not shown to have participated in the assault on Gajarajan, ought to have logically convicted them under section 326/149, Indian Penal Code, consistent with its finding in paragraph 65. That having not been done and the acquittal of accused 8, 9, 10, 16, 17 and 20 for the offence under section 326/149, Indian Penal Code, having become final, accused 3, 6, 7 and 19 would have to be acquitted of the same charge for the reasons hereinbefore mentioned. It would thus not only be unfair but self-contradictory to sustain the conviction of accused 11-15, 18 and 21-27 for the offence under section 326/149, Indian Penal Code. That would be an unequal treatment and, therefore, even though as members of the unlawful assembly they could have been fixed with vicarious liability, in view of the situation obtaining on the finding of the High Court, we have no option but to acquit them for the offence under section 326/149, Indian Penal Code. Accordingly, the conviction of accused 11-15, 18 and 21-27 for the offence under section 326/149, Indian Penal Code, as recorded by the High Court and the sentence imposed upon them for the same are set aside.

35. At this stage we must examine the prosecution case under charges Nos. 1 and 2. Under charge No. 1, accused 1, 6, 7, 8, 11, 12-15, 19-23, 26 and 27 have been convicted for an offence under section 147, Indian Penal Code, and under charge No. 2, accused 2, 3, 4, 5, 9, 10, 16, 17, 18, 21, 24 and 25 have been convicted for an offence under section 148, Indian Penal Code.

36. Before we examine these two charges in detail it would be necessary to find out as to when the unlawful assembly was formed, what was the common object of the unlawful assembly and who were the members of this unlawful assembly who committed the offence of rioting. To substantiate these two charges the prosecution relies on the evidence of P.Ws. 1, 2, 4, 6, 7, 8, 9, 10, 12, 13, 16, 17, 18, 19, 20, 21, 23 and 24. Before their evidence is analysed, a very shocking feature of the case which has made the task of this Court much more difficult is the glaring contradiction in the approach of the High Court. While analysing the prosecution evidence in paragraph 45, the High Court observes that it agrees with the reasons given by the learned trial Judge for disbelieving the testimony of P.Ws 10, 12 and 13, and confirms the acquittal of accused 8, 9, 10, 16 and 17 regarding he murderous assault on deceased Gajarajan. It would be clear that the evidence of P.Ws. 10, 12 and 13 was discarded both by the learned Sessions Judge and the High Court. However, while appreciating the evidence in respect of charges Nos. 1 and 2 the High Court has referred to the evidence of P.Ws. 10, 12 and 13 in paragraph 62 of the judgment and along with other evidence, has accepted the evidence of P.Ws 10, 12 and 13. To be frank, this is really incomprehensible and it might indicate the degree of indifference with which the evidence has been examined in this case while setting aside acquittal of 27 persons and convicting them all. Even Mr. Mulla learned Advocate for the respondent did not invite us to re-examine the evidence of P.Ws. 10, 12 and 13 and, therefore, it will have to be excluded from further consideration in respect of charges 1 and 2. Excluding the evidence of P.Ws 10, 12 and 13, we would briefly refer to the evidence of the remaining witnesses bearing on the question of charges Nos. 1 and 2.

37. It is the prosecution case that deceased Gajarajan alighted from a bus and when he was proceeding towards his house, a crowd emerged from Casuarina Thope. This crowd is witnessed by P.W. 1 and he refers to the presence of accused 1-23 in this crowd. The next witness in the sequence of events who observed the crowd is P.W. 16. Her evidence would show that she had seen certain persons collecting at Casuarina Thope as well as Cashewnut Thope and some of them were armed with sticks and knives. Her evidence

would show that when Gajarajan alighted from the bus, from Casuarina Thope a group of persons emerged and rushed towards Gajarajan. According to her Gajarajan was encircled and attacked near the well. She ran away towards her house. It is very surprising that this witness does not identify any one from amongst the crowd, who encircled Gajarajan near the well and attacked him. In fact in her examination-in-chief she makes it very clear that she would not notice or see distinctly as to who were all the persons who were present and obstructing and waylaying the deceased near the well. This is rather ununderstandable because the witness is a resident of the very village and she is shown to be 38 years old. The evidence of this witness would suggest that a large crowd had collected but it is not possible to believe that all of them were members of the unlawful assembly. It may be mentioned that according to P.W. 1, the deceased was first encircled and attacked near the well. Therefore, P.W. 1 was present at the time of the assault on the deceased near the well. There is evidence of P.W. 17 to the effect that he heard a commotion emanating from school side and saw a mob consisting of 40 to 50 persons running in the street. He identified accused 2, 3, 5, 9 and 15 in the crowd. There is also evidence of P.W. 9 that when he was returning home with his cattle in the after noon on the date of occurrence he saw Gajarajan alighting from the bus and a crowd running from Casuarina Thope and raising alarm '*Pidida*'. There is evidence of P.W. 8 to the same effect. Now, if some persons had collected at one place and on seeing Gajarajan alighting from the bus, emerged from that place and chased him, and some of them belaboured him, it can be said that they had met for a purpose and had a common object and acted in concert. Now, if some persons combined to attack Gajarajan and if they emerged together one can say that those who were the members of this assembly shared the common object of the assembly, *viz.*, to assault and even to cause hurt to Gajarajan. That at that stage an unlawful assembly was formed is unmistakably established.

38. Mr. Chitaley, however, urged that the events occurred in two distinct parts, one near the well and another near the house of P.W. 10 and that there was no correlation between the two; nor the incidents that occurred near the house of P.W. 10 were a continuation of what occurred near the well. In this connection he also urged that in fact something had happened on that day around 12 noon and, therefore, it could not be said that those who had collected at Casuarina Thope and Cashewnut Thope and had emerged on seeing Gajarajan formed an unlawful assembly. He invited our attention to the evidence of P.W. 12 the wife of P.W. 10 who has deposed that she had heard the noise on that day around 12 noon. This is a very casual statement made by the witness. In fact nowhere it is suggested that some incident occurred at 12 noon. This submission was sought to be reinforced by referring to the statement of accused 4 who was injured and was found to be lying at the scene of the occurrence by the police officer. Accused 4 has stated that he was beaten around 2 P.M. by the members of the crowd 100 strong and amongst them was Gajarajan who caused him injury with a patta knife. The statement of accused 4 stands by itself. There is nothing in the prosecution evidence to lend any assurance to it. On the contrary there is evidence of numbers of witnesses to be presently mentioned that it was when Gajarajan arrived that members of the crowd attacked him. It is, therefore, not possible to accept the submission of Mr.Chitaley that something happened at 12 noon and that at that time the aggressors were the members of the party of P.W. 31, P.W. 4 and deceased Gajarajan, and that something thereafter occurred at 2.30 P.M. in which possibly Gajarajan got injured. Further the occurrence was one whole and attack on Gajarajan which took place at different spots removed by 225 ft. is one and the same transaction. Undoubtedly, therefore, an unlawful assembly was formed by the time Gajarajan was attacked near the well, but we must administer a caution that at that time the only object of the unlawful assembly discernible was to attack and belabour Gajarajan. This seems significant because the High Court has convicted accused 1, 2, 4, 5, 19, 23, 24, 25 and 27 for specific acts of assault and in respect of each such assault found proof. The remaining accused were convicted with the aid of section 149, Indian Penal Code, meaning thereby that each such casual and separate act of assault on different persons was committed by the specific accused as member of the unlawful assembly and that the remaining members of the unlawful assembly knew that such offence was likely to be committed. On the facts of this case we are not disposed to

draw such an inference for the reasons to be presently mentioned.

39. While examining specific charges against individual accused, it may be mentioned that accused 1, 2 3, 4, 5, 6, 8, 9, 24 and 25 are being convicted for different offences and their presence as members of the unlawful assembly is satisfactorily established. Accordingly, agreeing with the High Court, the conviction of accused 1 and 8 for an offence under section 147, Indian Penal Code and conviction of accused 2, 3, 4, 5, 9, 24 and 25 for an offence under section 148, Indian Penal Code, and the sentences imposed upon them for the same are hereby confirmed.

40. Now, turning to the case of the rest of the accused, we would ordinarily accept the presence of those accused as satisfactorily proved in respect of whom at least there is reliable evidence of three witnesses and while analysing the evidence we would be rather slow to accept the evidence of P.W. 19 standing by itself who, as we would presently point out, has been materially contradicted by her statement under section 161, Criminal Procedure Code. Approaching the matter from this angle, we would briefly set out the evidence. The presence of accused 6 is consistently spoken to by P.Ws. 1, 19, 20 and 24 and that evidence establishes the fact that accused 6 was a member of unlawful assembly and charge under section 148, Indian Penal Code, is brought home to him. The presence of accused 7 is spoken to by P.Ws. 1, 19 and 20 but P.W. 19 has not referred to the presence of accused 7 in her police statement and, therefore, the reliable evidence is only of P.Ws. 1 and 20. On the test that we propose to apply in this case, accused 7 will have to be acquitted. The presence of accused 11 is spoken to by P.Ws. 1, 18 and 21, and his conviction for an offence under section 147, Indian Penal Code, and the sentence imposed for the same is confirmed. Against accused 12, 13 and 14 there is only evidence of P.Ws. 1 and 21 and we would rather hesitate to accept their presence as members of the unlawful assembly and, therefore, their conviction for an offence under section 147, Indian Penal Code, and the sentence imposed upon them for the same are set aside. In the case of accused 15, his presence is affirmed by P.Ws. 1, 16, 17 and 18 which evidence is reliable and, therefore, his conviction and sentence under section 147, Indian Penal Code, are confirmed. Against accused 19 there is the evidence of P.Ws. 1, 2, 19 and 23 and so far as accused 19 is concerned, P.W. 19 is consistent. Therefore this evidence is sufficient to confirm his conviction and sentence. So far as the case of accused 20 is concerned, his presence is referred to by P.Ws. 1, 19 and 24 and the evidence of P.W. 19 so far as this accused is concerned is quite consistent and his conviction and sentence are, therefore, confirmed. In respect of accused 22, there is the evidence of P.W. 1 alone. Similarly in respect of accused 26 there is the evidence of P.Ws. 6 and 21 alone and in respect of accused 27 there is evidence of P.Ws. 4 and 21 and for the reasons hereinbefore stated, we would hold that their presence is not satisfactorily established, and, therefore, the conviction of accused 22, 26 and 27 for an offence under section 147, Indian Penal Code, and the sentence imposed for the same are set aside. There is evidence of P.Ws. 1, 16 and 18 against accused 23 and that evidence is consistent and reliable and, therefore the conviction of accused 23 for the offence under section 147, Indian Penal Code, and the sentence imposed for the same are confirmed.

41. There is the evidence of P.Ws. 1, 16, 18, 19, 20, 21 and 24 against accused 10 but we would not take into consideration the evidence of P.W. 19 because she is not consistent so far as accused 10 is concerned. Even then there is sufficient and reliable evidence to affirm the conviction and sentence of accused 10. There is evidence of P.Ws. 1 and 19 only against accused 16 but P.W. 19 is contradicted by her police statement and, therefore, there remains the evidence of P.W. 1 alone against accused 16 and in the circumstances of the case it would not be possible to confirm the conviction and sentence of accused 16 for an offence under section 148, Indian Penal Code. His conviction and sentence for an offence under section 148, Indian Penal Code, therefore, set aside. Against accused 17 there is reliable evidence of P.Ws. 1, 2, 8, 19 and 23. Similarly, against accused 18 there is reliable evidence of P Ws. 1, 19 and 23 and accused 21 there is reliable evidence of P. Ws. 1, 6 and 24 and, therefore, the conviction of each of them under section 148, Indian Penal Code, and the sentence imposed upon them for the same are hereby confirmed.

42. Turning now to the specific charges of hurt or grievous hurt caused by specific accused to specific prosecution witnesses it would be advantageous to specify which charges are held proved by the High Court. The following chart will bear out the findings of the High Court :

Accused No.	Charge No.	Offence for which convicted.	No. of prosecution witness injured.	Weapon used.
1	7	U/s. 323, IPC	PW. 8	Stick.
2	9	U/s. 324, IPC	P.W 6.	Patta kathi.
3	11	U/s. 324. IPC	P.W. 2	do
4	13	U/s. 324, IPC	P.W. 7	do
5	17	U/s. 323, IPC	P.W. 1	Stone.
19	19	U/s. 325, IPC	P.W. 2	Stone.
23	21	U/s. 323, IPC	P.W. 13	Stick.
24	23	U/s. 324. IPC	P.W. 4	Patta kathi.
25	25	U/s. 324. IPC	P.W. 4	Iron Pipe
27	29	U/s. 323. IPC	P.W. 4	Stone.
3-10, 15-17, 19-21 & 23.	38	U/s. 427, IPC read with S. 34 (Mischief)	..	..
2, 3, 8 & 9	39	U/s. 427/34, IPC		

43. Under charge 7, accused 1 is convicted for having caused a hurt to P.W. 8 Gangappa Naicker by giving a blow with a stick on his left shoulder. There is evidence of P W. 8 to this effect and this evidence is borne out by the evidence of P.W. 15 Dr. Pragdeeswaran who found an abrasion medial 1/3 of the left clavicle 3″ × ¼″. An X-Ray did not reveal any fracture of the clavicle. If a stick blow was given by accused 1 to this witness he would be able to identify him as the incident occurred around 2-30 P.M. in broad day light. We agree with the High Court that accused 1 should be convicted for the offence under section 323, Indian Penal Code, and there is no reason to interfere with the sentence awarded to him.

44. Under charge 9 accused 2 is convicted for having committed an offence under section 324, Indian Penal Code, for in flicting an injury with a sharp-edged weapon like a patta knife on the left calf muscle of P.W. 6 Subramaniam. P.W. 11 Dr Ramachandran found an incised wound over the back of leftleg (over the calf 5″ below the knee), oblique 6 cms.×2 cms. The medical evidence thus corroborates the evidence of P.W. 6 and this evidence is further corroborated by the evidence of P.W.1. The High Court has accepted the evidence and we see no reason to take a different view, of the matter. Accused 2 was therefore, rightly convicted for an offecnce under section 324, Indian Penal Code, and we confirm the sentence of rigorous imprisonment for six months imposed upon him for the same offence.

45. Under charge 11 accused 4 is convicted for inflicting different injuries on the head of P.W. 2 Vedagiri with a sharp cutting instrument like patta knife. There is evidence of P.W.2 to that effect. P.W. 11 Dr. Ramachandran examined this witness and found as many as 14 injuries on his person. Exhibit P-8 is the certificate of injuries. From amongst these 14 injuries, injury No 2 is an incised wound over the left parietal region 4cms × 1/2 cm Injury No. 4 is an incised wound over the back of left ear 2 1/4cms. and injury No. 1 is a small incised wound over the temport region 2 cms × 1/2 cm This medical evidence would amply corroborate the evidence of P W 2. On this point there is also evidence of P W 1 which would render assurance to the evidence of P.W.2.

The High Court has accepted his evidence and we see no reason to take a different view of the the matter. Accordingly the conviction of accused No 4 for an offence under section 324. Indian Penal Code and the sentence of rigorous imprisonment for six months imposed upon him for the same are confirmed.

46. Under charge 13 accused No.4 is convicted for an offence under section 324, Indian Penal Code for causing hurt on the hand of P.W. 7 by a patta knife. The injury was caused on the left index finger of P.W. 7. There is evidence to that effect of P.W. 7. There is also evidence of P.W. 8 to the same effect. P.W. 11 Dr. Ramachandran found one incised wound on the pulp of left index finger 2 cms. × 1/4 cms. The injury was found fresh and was bleeding, when examined by Dr. Ramachandran. The High Court has accepted this evidence and nothing was pointed out to us to take a different view of the matter. We accordingly confirm the conviction of the accused under section 324, Indian Penal Code and the sentence of six months rigorous imprisonment imposed upon him.

47. Under charge 17 accused 5 was convicted for causing injury on the right knee cap of P.W.1 by pelting a stone at him. This part of evidence is borne out by the evidence of P.W. 11 Dr. Ramachandran who found a contused wound over the inner aspect of right leg, just 2 "below the knee, 2¼ cms × ¼ cms. of P.W.1. In the opinion of Dr Ramachandran such an injury could be caused by being hit by a stone. There is evidence of P.W.6 to the effect that he saw accused 5 chasing P.W. 1. We agree with the High Court that this evidence is sufficient to bring home the charge against accused 5 for an offence under section 323, Indian Penal Code and we affirm the conviction and sentence of accused 5 on this count.

48. Under charge 19 accused 19 has been convicted for causing injuries to P.W. 2 by hurling stones at him. According to the evidence of P. W. 2, by the stones pelted at him by accused 19 he was hurt on his left finger, chest and on the knee. Dr. Ramachandran examined P.W. 2 on 27th November 1968, *i.e.* on the date of the occurrence itself. He found as many as 14 injuries on his person. In the opinion of Dr. Ramachandran injuries 1, 2 and 4 of P.W.2 could have been caused by a patta knife and the remaining injuries could have been caused by being hit by stones or other objects. An X-Ray examination of injury 7 being a contusion over the dorsum of left-hand revealed a fracture of the middle left ring finger and in his opinion it was a case of grievous hurt. Now the charge in this case is that the principal attack was directed against Gajarajan and some members of the crowd were pelting stones. P.W. 2 has suffered as many as 14 injuries, some with deadly weapons like pata knife. It also appears that apart from accused 19 there were others from the mob who pelted stones. It is, therefore, difficult to believe that P.W. 2 when he was a victim of simultaneous assault by a number of assailants and ordinarily when stones were being pelted from a distance he would be able to identify and say with precision that a stone hurled by a particular accused caused him a particular injury. Along with this we have to bear in mind that an omission was brought on record with reference to his police statement which showed that he had not stated that a stone hurled by a particular accused caused him the particular injury. His attempt at specification and the further attempt to attribute injury No. 7 to accused 19 clearly suggests an improvement and the improvement seems to be motivated, *viz.*, to attribute specific injury to accused 19. At one stage according to P.W. 1, accused 19 was very near Gajarajan who had fallen in front of the house of P.W. 10 and was seen dropping a stone on his head. P.W. 2 was at some distance. Therefore, stones, if at all hurled at P.W. 2 must have been from a distance and again P.W. 1 does not say that he saw accused 19 hurling stones at P.W. 2. In this state of evidence we are not satisfied that accused 19 caused injuries to P.W. 2 by hurling stones his conviction for an offence under section 325, Indian Penal Code, cannot be sustained and it must be set aside as also the sentence imposed upon him for the same.

49. Under charge 21 accused 23 was convicted for an offence under section 323, Indian Penal Code for causing injury with a stick to P.W. 13. There is evidence of Dr. Pragdeeswaran to the effect that P.W. 13 was examined by him on 28th November 1968. The Medical Officer did not find any visible mark of injury but deposed that he found tenderness over the muscles on the back of P.W. 13 at that time. The name of accused 23 is Pazhandi Naicker. In the FIR, Ext. P-2 it is stated that Pachammal wife of Pazhandi Naicker

was having a stone. In his evidence P.W. 1 claimed that he knew Pazhandi Naicker accused No. 23. He also deposed that he had seen accused 23 in the mob that chased Gajarajan after emerging from Casuarina Thope. Now, it is not made clear whether the person referred to by P.W. 1 in First Information Report Exhibit. P-2 as described herein above is the same whose presence he referred to in the mob. It was rightly pointed out by Mr. Chitaley that accused 23 is 91 years old and that P.W. 13 Thirumathi Kannammal is a woman and if the stick blow was given to a woman, it is difficult to believe that there would not appear and visible mark of injury. Therefore, in the absence of medical evidence corroborating the evidence of P.W. 13, we are not inclined to accept the evidence of P.W. 13 that a blow was given to her with a stick by accused 23. Charge 21 is not thus brought home to accused 23 and his conviction for an offence under section 323, Indian Penal Code, and the sentence imposed upon him for the same are set aside.

50. We would next deal with the two charges Nos. 23 and 25 together. Under charge 23 accused 24 is alleged to have caused an injury to P.W. 4 with patta knife. Similarly, under charge 25 accused 25 was alleged to have caused an injury on the left had of P.W. 4 with an iron pipe. P.W. 4 Gnanamurthi is a brother of deceased Gajarajan as also of P.W. 31. P.W. 4 was examined by P.W. 15 Dr. Pragdeeswaran on 27th November, 1968 at about 6.-30 P.M. He found as many as 11 injuries on the person of P.W. 4. In his opinion injury No. 1 an incised wound 1" × 2" over the frontal region, could have been caused by a sharp-edged weapon and the remaining injuries of P.W. 4 could have been caused by a blunt weapon depending upon the force with which it was used. His further opinion is that an X-Ray of injury No. 11 revealed a fracture on the ankle in the lower end of tibia. He has also produced the certificate of injuries, Exhibit P-30. Mr Chitaley urged that the names of accused 24 and 25 are not mentioned in the First Information Report, Exhibit P-2. Accused 24 is the son of accused 11. Now, it is certainly true that the names of accused 24 and 25 are not shown in the First Information Report Exhibit P-2 lodged by P.W. 1. But we must remember that witness P.W. 4 is an injured witness. There is also the evidence of P.W. 6 who is an injured witness and whose presence cannot be disputed at the scene of occurrence. P.W. 6 lends assurance to the evidence of P.W. 4 against both accused 24 and 25 on the point of causing injuries to P.W. 4. It was again pointed out to us that P.W. 6 is not a resident of village Karpakkam. That may be so. But his cross-examination does not reveal that he was not able to identify the accused. The High Court has accepted the evidence of P.W. 4 against accused 24 and 25 and we are not disposed to take a different view of the matter. Therefore, we would confirm the conviction of accused 24 and 25 under charges 23 and 25 for an offence under section 324, Indian Penal Code, and the sentence imposed upon each of them for the same.

51. Under charge 29 accused 27 is convicted for an offence under section 323, Indian Penal Code, for causing hurt to P.W. 4 by pelting a stone at him. There is the evidence of P.W. 4 that a stone was hurled by accused 27 which caused hurt on his left leg. Dr. Pragdeeswaran found a minor abrasion over the left leg of P.W. 4 injury No. 10. P.W. 6 has deposed that he had seen accused 27 having a bag full of stones. But in his examination-in-chief he does no say that accused 27 hurled a stone and caused hurt to P.W. 4. At some stage in cross-examination as it was of a rambling character there appears in evidence that accused 27 did hurl a stone at P.W. 4. But an omission was brought on record with reference to his police statement in which he had not stated that accused 27 was one of the assailants of P.W. 4. Therefore, it could not be said that the evidence of P.W.6 lends assurance to the evidence of P.W. 4. P.W. 21 tried to refer to the presence of some accused persons but he is not clear whether he had seen accused 27 in the assembly. In this state of evidence there is evidence of P.W. 4 alone against accused 27 and if a stone is hurled from a distance and if he was being attacked by other accused with stones, it is difficult to believe that he would be able to say with certainty that it was the stone hurled by P.W. 27 which hit him and, therefore, the case against accused 27 on this point is not free from doubt. The offence under section 323, Indian Penal Code, has not, therefore, been brought home to her and her conviction and sentence for the offence under section 323, Indian Penal Code, are set aside.

52. Under charge No. 38 accused 3-10, 15-17, 19-12 and 23 have been convicted for an offence under section 427 read with section 34,

Indian Penal Code, in that all the accused in furtherance of the common intention caused damage to the pump set belonging to P.W.31 and his brothers and also caused damage to the zinc sheet shed under which the engine and the pump set were installed. In this connection the prosecution has examined two witnesses, P.Ws. 19 and 20, P.W. 19 is the sister of deceased Gajarajan and her daughter Sarasu was married with deceased Gajarajan. P.W. 19 has deposed thaton the date of the occurrence around 2.30 P.M. her daughter Sarasu came rushing to her house and told her about a commotion being raised in the village near the school. She asked her daughter Sarasu to go to Royapettah Hospital to inform P.W. 31 about the trouble. She then proceeded to the house of her brother and she saw a crowd demolishing the house of her brother. In the crowd she saw accused 6 armed with an iron rod who rushed at her. She went near the cattle shed. The zinc sheet shed was nearby and in the shed the engine and pump set were installed. She deposed that she saw accused 3, 8, 9 and 10 damaging the pump set. Accused 9 threw a big stone on the engine and the pump set and accused 3, 8 and 10 damaged the pump set by striking the engine with iron rods and sticks. The crowd also caused damage to the zinc sheet shed. Accused 7 went inside the house. She then stated that a crowd of 50-60 person entered the house and ransacked the doors windows, etc. In this crowd she recognised accused 1, 2, 3, 4, 6, 8, 9, 10, 15, 16 and 17 who were demolishing the doors and windows. She further deposed that she saw accused 5, 19, 23 and 28 in the crowd. She added that accused 20 and 21 were also in the crowd. She stated that after causing damage to the house all the accused ran away. Now, there is evidence showing that the house was ransacked and the engine and pump set were damaged *vide* Exhibits. P-31 and P-32. The question is : how many accused participated in causing the mischief? In the cross-examination she was specifically confronted with her police statement and it transpired that she had not named accused 6, 3, 8, 10, 9, 7, 2, 16 and 23 in her police statement as being members of the crowd causing damage to the pump set or the shed. Of course, we must make it clear that the question has been asked in the most objectionable manner and it is surprising that it was allowed to be put in that form. The relevant portion of the cross-examination reads as under:

"It is not (*sic*) the following accused alone against whom I allege as having taken part in the occurrence to the police when I examined A-1 Muthu Naicker; A-4 Singaram; A-15 Narayanaswami; A-21 Muthu; A-20 Govindan; A-28 Uli; A-17 Ramalingam; A-18 Ramakrishnan; A-19 Rajabathar; A-5 Raman as persons armed (with) pipes, knives and sticks at that time. (The learned Public Prosecutor concedes that the witness has mentioned only the names of aforementioned persons and not others whom the witness implicated along with these persons in this Court in examination in chief)."

53. This is the most objectionable manner of using the police statement and we must record our emphatic disapproval of the same. The question should have been framed in a manner to point out that from amongst those accused mentioned in examination-in-chief there were some whose names were not mentioned in the police statement and if the witness affirm this no further proof is necessary and if the witness denies or says that she does not remember, the investigation officer should have been questioned about it. The sum total of the recorded evidence is that the witness has not referred to the presence of accused 6, 3, 8, 10, 9, 7, 2, 16 and 23 in her police statement in the crowd. This omission is very important because she is the only material witness on this point. The High Court unfortunately has omitted to take any note of the omission. The High Court, however, observed that the evidence of P.W. 19 is corroborated by the evidence of P.W. 20. P.W. 20 Thirumathi Rani Ammal is the wife of P.W. 4 Gnanamurthi, the brother of deceased Gajarajan and P.W. 31. She deposed that she saw a crowd passing from opposite her house. She said that some members of the crowd were armed with weapons and on reaching near the house they entered the house and broke open the windows and doors with the weapons with which they were armed. She said that accused 9 entered the house and pushed out the two electricians working in the house. A grievance was made by Mr. Chitaley that these two electricians were not examined. As we are not satisfied about the evidence in respect of this charge, we are not inclined to attach any importance to the non-examination of the two electricians. Suffice it to say that they were strangers and would not have thrown any light on the participation of accused in the occurrence. The witness has stated that she saw accused 2, 3, 6,

7, 8, 9, 10 in the crowd. She deposed that accused 3, 8, 9, and 10 caused damage to the pump set. It would thus appear that witnesses P.Ws. 19 and 20 are consistent that accused 3,8, 9 and 10 were seen causing damage to the pump set. But it simultaneously transpires that P.W. 19 has not referred to the presence of accused 3, 8, 9 and 10 in her earlier police statement. The High Court merely made a cryptic statement that there is evidence of P Ws. 19 and 20 on this part of the prosecution case and that evidence is borne out by M O. 35 showing broken parts of oil engine, M.O. 36 wooden pieces of the window, M.O 37 another broken wooden part recovered from the scene of occurrence. There is no doubt that the house of the deceased and his brothers was ransacked. There is also no doubt that some damage was caused to the pump set and the engine, but on the question as to who took part from amongst the big crowd in this nefarious activity there is lack of consistency between the evidence of P Ws. 19 and 20 and P W. 19 the material witness is contradicted by her earlier statement. If we eliminate accused 2, 3, 6, 7, 8, 9, 10, 16 and 23 as having not been implicated at the earliest moment which would show that there was an improvement at the time of the evidence and if the evidence is that others were merely in the crowd, it cannot be said that charge No. 38 is brought home to the accused who are convicted. There is a reasonable doubt alout the veracity of the prosecution case on this point and the accused are entitled to the benefit of doubt.

54. Under the last charge No. 39, accused 2, 3, 8 and 9 have been convicted for committing an offence under section 427 read with section 34, Indian Penal Code, in that these accused along with several others entered the house of P.W. 18, Thirumathi Andal Ammal and caused damage to the tailoring machine, radio, glass almirah and other articles of household furniture. P.W. 18 deposed that a crowd came near her house and some of the members of the crowd were armed with knives and other weapons. She estimated the strength of the crowd to be 40 or 50 persons. She stated that some members of the crowd asked her whether her husband Vembuli Naicker was available inside the house or not and then immediately the members of the crowd entered her house. Among others, she recognised accused 1, 2, 3, 4, 5, 8, 9, 10, 11, 15, 17, 23. She said that from amongst these accused, accused 2, 3, 8 and 9 and one Kasi damaged the tailoring machine radio, glass almirah, etc. Some others caused damage to the doors. She deposed that accused 8 enquired whether her husband Vembuli Naicker was available as he was to be cut to pieces whereupon she ran to the backyard and hid herself behind a bush. Some time after further searching the house the crowd left the house. M.O. 28, M.O. 29, M O. 30, M.O. 31, M.O. 32 and M.O. 33 evidence the damage to the furniture and the broken pieces recovered from the scene of vandalism. Hers is the only evidence on this point. There is no infirmity pointed out in the evidence. If some accused caused damage to the articles belonging to her in her house in her presence and if the High Court chose to place implicit reliance on her evidence there is no reason to take another view of the matter and her evidence has been accepted only against accused 2, 3, 8 and 9 who have been convicted for an offence under section 427 read with section 34, Indian Penal Code. We agree with the High Court on the analysis of the evidence of P.W. 18 and confirm the conviction of accused 2, 3, 8 and 9. for an offence under section 427 read with section 34, Indian Penal Code, and the sentence imposed upon them for the same.

55. Turning now to the charges under heads 4, 8, 10, 12, 14, 18, 20, 22, 24, 26 and 30, it must be pointed out that under these charges all the accused were convicted with the aid of section 149, Indian Penal Code, in respect of specific offences committed by each individual accused in the case of one or the other prosecution witness. Without elaborating we must at once say that in a case of this nature where a large crowd collected all of whom are not shown to be sharing the common object of the unlawful assembly, a stray assault by any one accused on any particular witness could not be said to be an assault in prosecution of the common object of the unlawful assembly so that the remaining accused could be imputed the knowledge that such an offence was likely to be committed in prosecution of the common object of the unlawful assembly. To illustrate, when it is alleged that a certain accused pelted a stone and caused an injury to some one who came within the trajectory of the stone, could it be said that all other members of the unlawful assembly knew that such an offence would be committed? We are, therefore

not inclined to sustain the conviction of the accused for charges under heads 4, 8, 10, 12, 14, 18, 20, 22, 24, 26 and 30 and accordingly the conviction of the accused under the aforementioned charges and the sentence imposed for the same are set aside and they are acquitted of these charges.

56. Summing up the findings recorded by us under various charges, we confirm the conviction and sentence imposed upon accused 1, 6, 8, 11, 15, 19, 20 and 23 for the offence under section 147, Indian Penal Code. We set aside the conviction and sentence of accused 7, 12, 13, 14, 22, 26 and 27 and acquit them of the offence under section 147, Indian Penal Code.

57. The conviction and sentence of accused 2, 3, 4, 5, 9, 10, 17, 18, 21, 24 and 25 for the offence under section 148, Indian Penal Code, are confirmed. The conviction and sentence of accused 16 for the offence under section 148, Indian Penal Code, is hereby set aside and he is acquitted of the charge.

58. The conviction of accused 1, 2, 4 and 5 for the offence under section 302 read with section 34, Indian Penal Code, and the sentence of life imprisonment imposed upon each of them are hereby confirmed. The conviction of accused 3, 6, 7 and 19 for the offence under section 302/34, Indian Penal Code. and the sentence of imprisonment for life imposed upon each of them are hereby set aside and each one of them is acquitted of that charge.

59. The conviction and sentence of accused 11, 12, 13 14, 15, 18, 21, 22, 23, 24, 25, 26 and 27 for the offence under section 326/149, Indian Penal Code, are hereby set aside and each one of them is acquitted of the said charge.

59-A. The conviction and sentence of accused No. 1 for the offence under section 323, Indian Penal Code, under charge 7 are hereby confirmed.

60. The conviction and sentence of accused 2 under charge No. 9 for an offence under section 324, Indian Penal Code, are hereby confirmed.

61. The conviction and sentence of accused 4 under charges 11 and 13 for an offence under section 324, Indian Penal Code, are hereby confirmed.

62. The conviction of accused 5 for an offence under section 323, Indian Penal Code, under charge 17 and the sentence imposed upon him for the same are hereby set aside and he is acquitted of that charge.

63. The conviction and sentence of accused 23 for an offerce under section 323, Indian Penal Code, under charge 21 are hereby set aside and he is acquitted of that charge.

64. The conviction and sentence of accused 24 for an offence under section 324, Indian Penal Code under charge 23 are hereby confirmed.

65. The conviction and sentence of accused 25 for an offence under charge 25 are hereby confirmed.

66. The conviction and sentence of accused 27 for an offence under section 323, Indian Penal Code, under charge 29 are set aside and the accused is acquitted of that charge.

67. The conviction of accused 3, 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 19, 20, 21 and 23 for an offence under section 427/34, Indian Penal Code, under charge 38 and the sentence imposed upon them for the same are hereby set aside and all the accused herein mentioned are acquitted of that charge.

68. The conviction of accused 2, 3, 8 and 9 for an offence under section 427/34, Indian Penal Code, and the sentence imposed upon them for the same under charge 39 are hereby confirmed.

69. The conviction of the various accused by the High Court under charges 8, 10, 12, 14, 18, 22, 24, 26 and 30 for offences under sections 323, 324 and 325, Indian Penal Code read with section 149, Indian Penal Code, and separate sentences imposed upon them for the same are set aside and all the accused therein involved are acquitted of these offences.

70. The substantive sentences are directed to run concurrently.

71. Criminal Appeals Nos. 230 and 238 of 1972 and 97 of 1973 are partly allowed to the extent conviction and sentence for various offences hereinabove set out are set aside and dismissed to the extent conviction and sentences are confirmed. Those of the accused who are sentenced to suffer imprisonment should be given adjustment for the period they were in prison either as undertrial prisoners or as convicts after the High Court convicted them, according to law.

V.K. ——— *Order accordingly.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*V. R. Krishna Iyer and D.A. Desai, JJ.*

D. Nataraja Mudaliar .. *Appellant**

v.

The State Transport Authority, Madras .. *Respondents*

(A) *Constitution of India* (1950), *Article* 136—*Refusal to renew stage carriage permit under Motor Vehicles Act—Appeal by special leave—Interference by Supreme Court—Practice.*

Ordinarily the Supreme Court is loath to reinvestigate questions relating to motor vehicles permits; but every rule has an exception. If fundamental rights to ply stage carriage permits are disposed of as if by executive fiats, the Supreme Court must intervene to uphold the credibility in the rule of law and prevent its derailment. The touchstone is not the little man and his little *lis* but the arge issue and the deep portent. [*Paras.* 7, 17.]

(B) *Motor Vehicles Act* (*IV of* 1939), *sections* 50 *and* 58—*Application for renewal of stage carriage permit—Disposal of—Duty of Transport Authorities—Duty to act quasi-judically and to observe rules of natural justice.*

The transport tribunals function quasi-judicially and this imports some imperatives. You must tell the man whose fundamental right you propose to negative the materials you may use in your decision. You must act on relevant considerations, properly before you, not on rumour or hearsay, *ex cathedra* assertions or inscrutable hunch. The Authority must remember that a permit-holder has an ordinary right of renewal unless it is shown that outweighing reasons of public interest lead to a contrary result. Permits are not bounty but right, restricted reasonably by the Motor Vehicles Act. [*Paras* 8, 9.]

In the present case there are no relevant grounds justifying the refusal to renew the permit ; there is breach of natural justice; there is importation of non-materials ; there is unawareness of the fact that a fundamental right is involved and that a costly coach is condemned to non-use. The basic reason for quashing the order of refusal is the untenable reason assigned to support the order. [*Para.* 16.]

The Judgment of the Court was delivered by

Krishna Iyer, J.—Arbitrary orders and mystical directions have poor mileage in this Court when irrelevance and unreason are writ on their face even though the sanctity of concurrent error may give them some shelter.

2. To ply a contract carriage is a fundamental right but it can be restricted reasonably as has been done by the Motor Vehicles Act, 1939. The perspective is that what is fundamental is the right, not the restriction. Here, one Mudaliar, the appellant, owned a luxury coach, plied it for public benefit under a permit of 1971 for five years. The statutory criteria for grant of such permits is set out in section 50 and renewals of permits must be governed by the same considerations, the procedure being regulated by section 58. There is no grievance made that procedural violations are involved here. All that we know is that the permit was to expire in March 1976, and so a renewal application was made two months earlier. The State Transport Authority (for short, S.T.A.) rejected the request for renewal on the score that the 'ITDC has expanded its activities' and has in the field many tourist vehicles. Then the Authority added : '*It is said* that the utilisation of these vehicles is in the range of 90 to 100 per cent. during the tourist season only (November to February) and that it is just 60 to 70% during other periods'. The Tamil Nadu State's transport system also has vehicles on the road and some spare buses. All told, a few hundred motor vehicles, some of which are stage carriages and some contract carriages, serve the, travelling public. On these statements conclusion was reached: 'The State Transport Authority therefore considers that the facilities provided by these *public sector* undertakings are adequate. Renewal of the applicant's permit will not only be redundant in the circumstances but also result in *unhealthy competition*'. The order does not indicate that anyone appeared and objected.

3. The State Transport Appellate Tribunal (S.T.A.T.), to use an acronym), on appeal under section 64, affirmed the rejection, using the same reasoning. About the abundant transport facilities developed since 1971,

*C.A. No. 1083 of 1978, 6th September, 1978.

the Tribunal said : 'The learned counsel for the appellant has no doubt stated that *there is no material* to hold the details (occurring at para. 2 of the order) to be correct. The State Transport Authority is dealing with the provision of transport in the State level and he is expected to be in touch with the details of the availability of service from different sources and those particulars furnished by the S.T.A. could not also be said to be in any way strange As the authority is having these details readily available it was open to the authority, to rely upon those details before coming to conclusion about the need for renewal as asked for by appellant. It is not therefore proper to comment on the details made available in para. 2 of the order'. He obscurely encored, without any facts, that there would be 'unhealthy competition'. What is truly occult is the casual dismissal of an unanswerable factor : 'The appellant has stated in his affidavit that inasmuch as applications have been called for, for the grant of 100 tourist cabs, 15 omni-buses and 10 omni-tourist buses for the State of Tamil Nadu, the comment about the absence of need for renewing the permit as made by the State Transport Authority is not proper.'

4. The Departmental Representative has filed a memo. of objection stating that *applications have been called for, for the issue of permits* valid to ply throughout India and the same is not a relevant material, as the applicant, permit is in respect of the State of Tamil Nadu alone. The learned counsel for the appellant would contend that for the limited purpose of making out that there is need for additional service, this factor may also be considered. 'No doubt, *it is admitted that applications have been called for, for the issue of permits to be effective all over India.* The appellant's permit is having a restricted application within the State. As such the fact that applications have been called for, for the grant of All India Permits, does not in any way become relevant or important and the same can be ignored'. The S.T.A.T. has countered the appellant's claim of meritorious service by reference to past infirmities not adverted to anywhere in the order of the S.T.A.

5. The High Court, in revision, washed its hands off the case by the observation : 'It is not for this Court to traverse into these questions of fact and find out whether there is any need for adequacy under the revisional jurisdiction. How many permits the India Tourism Development Corporation should have been granted is not the subject-matter of this revision petition. This concerns merely with the refusal to renew the permit which, in my view, has been done on very valid and tenable reasons."

6. The whole issue has been made more fishy by the S. T. A. granting two contract carriage permits in 1978 after rejecting the renewal application holding there were already too many vehicles.

7. Should the Court interfere under Article 136? Ordinarily, no. But if a small man, whose heavy investment in a tourist coach is to be sterilised altogether, it is a social trauma; and if fundamental rights are disposed of as if by executive fiats, this Court must intervene to uphold the credibility in the rule of law and prevent its derailment. The touchstone is not the little man and his little lis but the large issue and the deep portent.

8. Section 50 specifies the guidelines. The transport tribunals function quasi-judicially and this imports some imperatives. You must tell the man whose fundamental right you propose to negative the materials you may use in your decision. You must act on relevant considerations, properly before you, not on rumour or hearsay, *ex cathedra* assertions or inscrutable hunch.

9. The Authority must remember that a permit-holder has an ordinary right of renewal unless it is shown that outweighing reasons of public interest lead to a contrary result. Permits are not bounty but right, restricted reasonably by the Motor Vehicles Act.

10. The key criterion when a contract carriage permit is sought, is to ask oneself whether an extra vehicle is unnecessary or undesirable in the public interest, and whether, further, the permits already granted are sufficient for or in excess of the needs of the region. After all, a few hundred vehicles admittedly ply and one contract carriage operator is asking for *a single permit.* What makes it unnecessary or undesirable in the public interest? Ordinarily, having regard to the explosive increase in traffic in our country, more vehicles are needed. Of

course, if the roads are in a precarious condition or competitive racing or reckless driving on the roads make for hazards or if the operator is otherwise disqualified, one may reduce the number of vehicles and refuse permit or renewal. Nothing of the sort is mentioned in any of the orders rejecting the permit. Assuming there are around 3000 or 4000 motor vehicles, how does one more become too many? It is a preposterous proposition to say so, in the absence of some evidence. If there is no evidence to warrant such a conclusion the right to the permit must prevail.

11. Is there any evidence in this case? The Authority asserts that the utilisation of existing vehicles is of the order of '90 to 100 per cent.' during the tourist season. This indicates that at least during the tourist season one more tourist coach will be welcome to relieve congestion. The authority further states that *it is said*............'Just 60 to 70 per cent.' is utilised during the other periods. "It is said"—by whom, to whom, when, how, and was it put to the applicant? All this is shrouded in mystery. Whatever is said by someone, somewhere, is not material here. It must be on the record. While the STA may know the total number of vehicles on the road it must have made a study of specific materials to ascertain whether there is unused vehicular potential. Merely to rely on 'it is said' in the passive voice is not judicial. Moreover, not to put it to the applicant before rejecting his renewal is not fair. The bare *ipse dixit* that the 'State Transport Authority considers the facilities provided by *public sector* undertakings are adequate', is not intelligible, without some basis. Nor does 'public sector' and 'private sector' enter the picture. Some objective assessment to exclude the petitioner based on tangible data is the minimum for a judicial negation of a fundamental right. The reference to 'unhealthy competition' is baffling. If there are 300 or more buses and one more is sought to be added, what is the ill-health in the traffic system that will be injected by this addition? We must remember that the tourist coach of the petitioner is to travel all round Tamil Nadu and so the image of a particular route overcrowded with too many buses making for cut-throat competition and imperilling passengers' lives does not arise.

12. The STA has no research staff to investigate the untapped transport or traffic potential and if it has any, such report must be put to the applicant.

13. Moreover, it is obvious that the State Transport Authority should have granted one permit less to the I. T. D. C., if its case of redundancy were true. For, the appellant had a current permit then.

14. Another circumstance effectively negating the story of supernumerary vehicles is the admitted fact that applications for more permits have been invited and some granted. And before us, two orders granting permits for contract carriages since the impugned refusal have been filed. And yet Mudaliar goes to the wall, on a cavalier 'no' to his application for renewal.

15. Fair consideration of his claim has been denied to the appellant; his huge investment has gone to waste because of non-renewal.

16. We see no relevant ground justifying the order; there is breach of natural justice; there is importation of non-materials; there is unawareness of the fact that a fundamental right is involved and that a costly coach is condemned to non-use. The basic reason for quashing the order of refusal is the untenable reason assigned to support the order. We allow the appeal, set aside the refusal of renewal and having regard to the long delay and absence of disqualifications, direct the State Transport Authority to reconsider the grant of renewal within two weeks of receipt of this order.

17. We repeat for emphasis that ordinarily this Court is loath to re-investigate questions relating to motor vehilce permits; but every rule has an exception even as every cause has a martyr.

V.K. —— *Appeal allowed.*

[END OF VOLUME (1979) 1 M.L.J. (S.C.).]